

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 28

JOHN WALTER OAKLEY, JR., PETITIONER

VS.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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1 In District Court of The United States for the  
Eastern District of Kentucky, at London

No. 363

JOHN WALTER OAKLEY, JR., CORBIN, WHITLEY COUNTY,  
KENTUCKY, PLAINTIFF

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT

*Complaint*

Filed April 14, 1947

Plaintiff, John Walter Oakley, Jr., alleges that:

1. This is a complaint under Section 8, Sub-Section (e), Selective Training and Service Act of 1940 (54 Stat. 890) 50 U. S. Code App., Section 308 (e), as amended (56 Stat. 724), and the jurisdiction of this Court is based on that section.

2. Plaintiff is a resident of the Eastern District of Kentucky, and resides at 923 Barbourville Street, Corbin, Whitley County, Kentucky.

3. Defendant is a corporation organized under the laws of the State of Kentucky, and doing business in the Eastern District of Kentucky, carrying on the business of railroading.

4. Beginning on or about July 1, 1938, until May 7, 1944, plaintiff was employed by the defendant, starting as apprentice at Louisville, Kentucky; being promoted to machinist in 1941 at Louisville; giving up his seniority rights in 1943 to be transferred to the Loyal Yard of the Louisville and Nashville Railway Company, as a locomotive machinist, where he was employed at the time he entered the Armed Forces of the United States.

2 5. Plaintiff was paid wages or salary for said employment by said defendant company at the time of his entry into the Armed Forces at the rate of \$1.06 per hour.

6. Plaintiff continued to work for and occupy said position in the employment of the defendant until May 7, 1944, at which time plaintiff was inducted into the Armed Forces of the United States, and thereupon entered the military training and service of said Armed Forces. Plaintiff was registered with the Selective Service Board of Registration, Local Board No. 58, Harlan, Kentucky, and his Order Number was 10036.

7. Plaintiff satisfactorily completed his training and service in the Armed Forces of the United States and was honorably discharged therefrom on May 22, 1946, and on June 1, 1946, within ninety days after his discharge applied to the defendant for re-

employment in the position and employment he occupied with the defendant at the time he was inducted into the Armed Forces, with the seniority and pay that he would have had had he continued in the employment, and had he not served in the Armed Forces of the United States for the time above set out.

8. After plaintiff had made application for reemployment on June 1, 1946, he was reemployed by the defendant on July 17, 1946, as locomotive machinist at the rate of pay of \$1.92 $\frac{1}{2}$  per hour, which was the same employment that he had at the time of his entering the Armed Forces, and the increase of \$0.16 $\frac{1}{2}$  per hour was the increase given to all locomotive machinists regardless of seniority; that upon his reemployment he was given seniority on the date of said reemployment of July 17, 1946, when he was entitled to seniority from July 1, 1945, had he been given the seniority that he would have had had he remained in the employment of the company during the period of his service in the Armed Forces.

9. Plaintiff states that during his service in the Armed Forces on July 1, 1945, the Loyal Shop of the Louisville & Nashville Railway Company was transferred to Corbin, Kentucky, and that had he not been in the Armed Forces he would have been transferred to the Corbin Shop with seniority from July 1, 1945, instead of July 17, 1946, when he was reemployed; that he is now having to work from 11:00 P. M. to 7:00 A. M., when with his seniority rights established he would be working from 7:00 A. M. to 3:00 P. M.; that there is also the possibility that he may be cut off entirely unless he has the advantage of the seniority to which he is entitled.

10. Plaintiff states that he is qualified to perform the duties of locomotive machinist, and also physically able to perform said duties, having been performing the duties of locomotive machinist since his reemployment with this company.

11. Plaintiff alleges that he is entitled to be restored to seniority from July 1, 1945, which seniority he would have had had he not served in the Armed Forces of the United States, and remained in the continuous employment of the defendant.

Wherefore, plaintiff respectfully prays:

(a) That this Court adjudge and decree that the plaintiff be given seniority from July 1, 1945, which seniority status he would have had in his employment with the defendant company had he not served with the Armed Forces for the period of time mentioned herein;

(b) That plaintiff have such other and further relief as may be just and proper in the premises, including costs.

(S) KIR C. ELSWICK,  
Assistant United States Attorney.

The affiant, Kit C. Elswick, Assistant United States Attorney for the Eastern District of Kentucky, says that the statements contained in the foregoing Complaint are true, as he verily believes.

(S) KIT C. ELSWICK.

Subscribed and sworn to before me by Kit C. Elswick, this 14th day of April 1947.

4 In United States District Court

*Summons*

Filed April 23, 1947

To the above named defendants: You are hereby summoned and required to serve upon Kit C. Elswick, Asst. U. S. Attorney, Plaintiff's attorney, whose address Lexington, Kentucky, an answer to the complaint which is herewith served upon you, within 2 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(S) A. B. ROUSE, Clerk.

APRIL 14, 1947.

*Return on summons*

I hereby certify and return, that on the 14th day of April 1947, I received the within summons and on April 15, 1947, executed the same on the Louisville & Nashville Railway Company by serving a true copy of the within writ, with copy of petition attached, on J. M. Johnston freight agent of said railway company, at Lexington, Fayette Co., Ky.

J. M. MOORE,

*United States Marshal.*

By (S) R. A. GAYLE,

*Deputy U. S. Marshal.*

In United States District Court

*Order*

Filed April 29, 1947

This day came defendant by counsel, Charles S. Landrum, and offered for filing Request for Admission under Rule 36 and the Court being advised; it is Ordered that said Request for Admission under Rule 36 be and the same is hereby filed and noted of record.

(S) H. CHURCH FORD,

*Judge, U. S. District Court.*

*Request for admission under rule 36*

Filed April 29, 1947

Defendant, Louisville & Nashville Railroad Company, requests plaintiff to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

1. Plaintiff, John W. Oakley, Jr., started working as a machinist at Loyall, Ky., on July 6th, 1943.
2. Glen B. Wolfe started working as a machinist at Loyall, Ky. on May 13th, 1929.
3. Robert S. Kallem started working as a machinist at Loyall, Ky. on October 4th, 1926.
4. Pearl M. Shell started working as a machinist at Loyall, Ky., August 19th, 1926.
5. Elijah J. Saylor started working as a machinist at Loyall, Ky. June 27th, 1926.
6. On July 1st, 1945, because there was not sufficient work at Loyall, Ky., Glen B. Wolfe, Robert Kallem and Pearl M. Shell were laid off.
7. Recently Elijah J. Saylor was granted a leave of absence on account of serious illness and from the date such leave of absence was granted to him Pearl M. Shell has been working as machinist at Loyall.
8. The machinist work of defendant at Loyall can be done and is well being done by Pearl M. Shell and machinists senior to Shell.
9. From July 1st, 1945, to date of illness of Elijah J. Saylor, the machinist work at Loyall was done by Saylor and machinists senior to Saylor.
10. On July 18th, 1946, Mr. H. Feather received the following letter from plaintiff, John W. Oakley, Jr., dated July 1st, 1946:  
 "Inasmuch as I was laid off in force reduction at Loyall, Kentucky, as machinist on July 1, 1945, and was in the armed forces of the U. S. stationed in Germany at that time, kindly accept this as my application for a job as machinist at Corbin, in accordance with Rule 26 (b) of the agreement effective Sept. 1, 1943.

"Also accept this as my request for seniority dating of July 1, 1945, at Corbin, Kentucky, since if I had been working at Loyall and had not been in the Armed Forces, I would have accepted a position in Corbin at that time. This request is justified and is in accordance with the G. I. Bill of Rights and also

the agreement dealing with returning veterans between the L&N R. R. and System Federation No. 91."

11. H. Feather is Master Mechanic for defendant and as such is in charge of all mechanical forces at Corbin, Ky., Loyall, Ky., and several other points on defendant's railroad.

12. On July 18th, 1946, plaintiff started working for defendant as machinist at Corbin, Ky.

13. Plaintiff was, on July 18th, 1946, placed on seniority list as machinist at Corbin with seniority from that date.

14. On July 18th, 1946, Plaintiff was restored to his former position on the seniority list of machinists at Loyall, Ky.

15. Plaintiff's seniority as machinist at Loyall, Ky., dates from July 6th, 1943.

16. Since July 1st, 1945, because of changed circumstances, during the period plaintiff was in the Armed Forces there has been no work for plaintiff at Loyall, nor has there been work for some of the machinists senior to plaintiff at that point, and it has been impossible to employ plaintiff at that point and would be unreasonable for defendant to employ plaintiff at Loyall.

17. Had plaintiff not been in the Armed Forces, he would have been laid off at Loyall when the forces were reduced at that point on July 1st, 1945.

18. Plaintiff will be called back for work at Loyall in his turn according to his seniority standing at that point, if, and when, the conditions and circumstances change and there is work to be done at that point that calls for the services of those senior to plaintiff and plaintiff.

19. At Corbin he is assigned and will be assigned to work according to his seniority at Corbin, which said seniority dates from the date and time he started to work at that point, to wit July 18th, 1946.

20. Defendant employs 131 machinists at Corbin, Ky., and plaintiff stands No. 28 on the seniority list of machinists at Corbin.

21. The seniority of machinists at Corbin, Ky. of those starting to work as machinists at Corbin, Ky. between December 18th, 1944 and July 18th, 1946, are as follows:

No. 122	Chester C. Parrott	Dec. 18th, 1944
No. 123	Vernon C. Vandermark	Nov. 20th, 1945
No. 124	N. M. Jenkins	April 7th, 1946
No. 125	L. C. Whitus	June 5th, 1946
No. 126	L. S. Stansberry	June 17th, 1946
No. 127	G. G. Harp	June 20th, 1946

The seniority of each of said machinists dates from the time each of them started to work as machinists at Corbin, Ky.

22. The International Association of Machinists operating through System Federation No. 91, Railway Employees' Depart-

ment, American Federation of Labor is the duly authorized, designated, and recognized bargaining agent or representative of the machinists employed by defendant.

23. The agreement between defendant and its machinists represented by International Association of Machinists, dated September 1st, 1943, contains the following:

**"Rule 26—Transfer of Laid-Off Employees**

"26 (a) While forces are reduced, if men are needed at other points, furloughed men will be given preference to transfer, with privilege of returning to home station when force is increased, such transfer to be made without expense to the company, seniority to govern.

8 "26 (b) An employee laid off in force reduction desiring to secure employment under this rule shall notify his foreman in writing and furnish his craft General Chairman copy of the letter."

**"Rule 28—Seniority**

"28 (a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.

"28 (b) Seniority of employe in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:

Machinists \* \* \* \*

24. On January 15th, 1943, defendant entered into the following memorandum of understanding with the machinists employed by it and represented by the International Association of Machinists:

**"Memorandum of Understanding**

**"Protecting Seniority of Employees Entering Military or Naval Service**

"Pursuant to Federal legislation (i. e., Public Resolution No. 96 of the 76th Congress, and the Selective Training and Service Act of 1940) any employee of this Company who has established a seniority date and who shall be ordered or inducted into the land or naval forces in accordance with such legislation, or has enlisted in the land or naval forces after the declaration of the existence of any emergency by the President of the United States on September 8, 1939, shall upon completion of such service in the land or naval forces, be restored to such position with this Company, (including rights to promotion) to which his accumulated seniority entitles him, all in accordance with the then existing rules of the schedule agreement, the same as if he had remained in

9 the service (such right to be exercised by the individual within five days from his reporting for duty), provided, upon completion of his service he receives from the Government a certificate as provided by the law, or other proper evidence of release, is still qualified to perform the duties of such position, makes application for return to service within forty days after he is released from such training and service, and provided this Company's circumstances have not been so changed as to make it impossible or unreasonable to return him to his former position or a position of like seniority, status and pay, provided, that in connection with voluntary enlistments in the regular land or naval forces, the above will apply only to the first period of such enlistments.

"The general purpose hereof is to provide that all such persons who return to the service of this Company in accordance with the provisions of the paragraph above, shall be considered as having been on leave of absence or furlough during their period of training and service, and shall be restored to service without loss of seniority.

"Such employee, while so engaged in military or naval service will be granted free transportation to the same extent as though they were engaged in the active service of this Company, except no passes will be issued for travel under military orders."

(S) C. S. LANDRUM,  
*Attorney for Defendant.*

Address: Union Station Building, Lexington, Kentucky.

This request for admission served upon Kit C. Elswick, Assistant U. S. Attorney by delivering a copy of same to him in his office at Lexington, Kentucky, this April 29th, 1947.

(S) C. S. LANDRUM.

10 In United States District Court

*Order*

Entered April 29, 1947

Came the defendant, by counsel, C. E. Rice, Jr. and C. S. Landrum, and offered for filing Answer herein and the Court being advised,

It is ordered that the Answer be filed and noted of record.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court.*

## In United States District Court

*Answer*

Filed April 29, 1947

## FIRST DEFENSE

Defendant admits the allegations stated in paragraphs 1, 2, 3, 5, 6, 7, and 10 of the complaint; denies the allegations stated in paragraphs 9 and 11 of the complaint; admits the allegations stated in paragraphs 4 and 8 of the complaint except that it denies that plaintiff was transferred to Loyall yards or that giving up his seniority rights at Louisville in 1943 was conditioned on any transfer from Louisville to Loyall, and says that plaintiff was employed as a machinist at Loyall on July 6th, 1943, and that his seniority as machinist at Loyall dates from July 6th, 1943, the day he started to work at that point; denies that plaintiff was or is, entitled to seniority at Corbin, Ky., from July 1st, 1945, or from any other date than July 18th, 1946; and denies that had plaintiff remained in the employment of defendant during the period of his services in the Armed Forces, he would have been given seniority at Corbin, Ky., as of July 1st, 1945.

## SECOND DEFENSE

Defendant says that when plaintiff entered the Armed Services it had in its employment 11 machinists at Loyall, Ky., and that plaintiff was the youngest or junior to all other machinists employed at that point; that his seniority as machinist at that point dated from July 6th, 1943; that during the period that plaintiff was in the Armed Forces, the work of defendant at Loyall decreased and by reason thereof on July 1st, 1945, three machinists senior to plaintiff were laid off; that the men so laid off were Glenn B. Wolfe with seniority from May 13th, 1929; Robert S. Kallem with seniority from October 4th, 1926, and Pearl M. Shell with seniority from August 19th, 1926; that after making said reduction in its forces at Loyall on July 1st, 1945, there remained only seven machinists working at Loyall, the junior machinist retained at that point started working as machinist at that point on June 27th, 1926; that said seven machinists could well do all of the work of the defendant at Loyall after July 1st, 1945; that when plaintiff returned from the Armed Forces he was, by defendant, given his same position on the seniority list at Loyall, which was, and is, junior to the said three machinists laid off on July 1st, 1945; that during the time plaintiff was in the Armed Services defendant's circumstances so changed as to make it impossible and unreasonable for it to give plaintiff

actual work as machinist at Loyall shops and that because of said changed circumstances it could not give to plaintiff actual work at Loyall without misplacing or laying off a machinist senior to plaintiff.

### THIRD DEFENSE

Defendant states that the International Association of Machinists operating through System Federation No. 91, Railway Employees' Department American Federation of Labor is the duly authorized and designated bargaining agent or representative of the machinists employed by it; that defendant on September 1st, 1943, entered into an agreement with its machinists represented by said bargaining agent and said agreement provides, among other things, that the seniority of the machinists employed by it shall be confined to the point employed and that said seniority shall begin from the date and time the employee starts to work at the point employed; that said agreement further provides that when forces are reduced, if men are needed at other points,

12 the men cut off by said reduction of force will be given preference to transfer to some other points if men are needed at such other points, with the privilege of returning to home station when force is increased at such home point; that when plaintiff returned from the Armed Forces and because of the changed conditions and circumstances work could not be furnished him at Loyall, he applied for work at Corbin and started his work as machinist at that point on July 18th, 1946, and that in accordance with said agreement he was given seniority as machinist at Corbin from July 18th, 1946, and now holds that seniority as well as seniority from July 6th, 1943, as machinist at Loyall.

Wherefore, defendant demands that plaintiff's complaint be dismissed.

(S) C. S. LANDRUM,

(S) C. E. RICE JR.,

*Attorneys for Defendant,*

*Address: Union Station Building, Lexington, Kentucky.*

This answer served on Kit C. Elswick, Asst. U. S. Atty. by delivering a copy of same to him at his office at Lexington, Kentucky. This the 29th day of April, 1947.

(S) C. S. LANDRUM.

In United States District Court

*Order*

Filed May 9, 1947

Comes Kit C. Elswick, Assistant United States Attorney, and tenders and offers for filing a Response to the request of the defendant for admission under Rule 36 of the Rules of Civil Procedure, and the same is Ordered filed and noted of record.

(S) H. CHURCH FORD, *Judge*.

13 In United States District Court

*Response to request of Defendant for admission  
under Rule 36*

Filed May 9, 1947

Comes the plaintiff, John Walter Oakley, Jr., by Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and Kit C. Elswick, Assistant United States Attorney, and for response to defendant's request for admissions under Rule 36 of the Rules of Civil Procedure states as follows:

1. Admits this statement to be true.
2. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
3. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
4. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
5. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
6. Admits this statement to be true.
7. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
8. Admits this statement to be true.
9. Admits this statement to be true.
10. Admits this statement to be true.
11. Admits this statement to be true.
12. Admits this statement to be true.
13. Admits this statement to be true.
14. Does not have sufficient information as to whether this statement is true or false, and therefore denies same.
15. Admits this statement to be true.
16. Admits this statement to be true.
17. Admits this statement to be true.
18. Admits this statement to be true.

19. Admits this statement to be true.  
20. Admits this statement to be true.  
21. Admits this statement to be true.  
22. Admits this statement to be true.  
14 23. Admits this statement to be true.  
24. Admits this statement to be true.

Respectfully submitted.

(S) JOHN WALTER OAKLEY, Jr.,  
By CLAUDE P. STEPHENS,  
*United States Attorney.*

And KIT C. ELSWICK,  
*Assistant U. S. Attorney.*

The affiant, John Walter Oakley, Jr., states that he had read the above response to request of defendant, and the same is true.

(S) JOHN WALTER OAKLEY, Jr.

Subscribed and sworn to before me by John Walter Oakley, Jr., this the 8 day of May 1947.

[SEAL]

(S) WILLIAM T. TIPTON,  
*Notary Public, Whitley County,  
Residing at Corbin, Kentucky.*

My Commission expires January 28, 1948.

In United States District Court

*Order*

Entered May 12, 1947

By agreement of counsel for the plaintiff and defendant, the above styled case is continued for further orders of the Court.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court.*

15 In United States District Court

*Order*

Entered May 16, 1947

Came the defendant, by counsel, C. S. Landrum, and offered for filing, Motion for Summary Judgment, and Affidavit of H. Feather, Brief for Defendant on Motion for Summary Judgment, and the Court being advised,

It is ordered that the Motion, Affidavit and Brief be filed and noted of record.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court.*

In United States District Court

*Motion for summary judgment*

Filed May 16, 1947

Defendant, Louisville & Nashville Railroad Company, moves the court for a summary judgment in its favor because the pleadings, the admissions on file, together with the affidavit of H. Feather, filed herewith in support of this motion, show that there is no genuine issue as to any material fact necessary for a decision in this case.

(S) C. S. LANDRUM,  
*Attorney for Defendant,*

*Address: Union Station Building, Lexington, Ky.*

Copy of this motion with copy of affidavit of H. Feather referred to in this motion delivered to Kit C. Elswick, this the 16th day of May 1947.

(S) C. S. LANDRUM.

16

In United States District Court

*Affidavit of H. Feather*

Filed May 16, 1947

Affiant, H. Feather, states that he is a resident of Corbin, Kentucky; that he is Master Mechanic for the Louisville & Nashville Railroad Company and in charge of the said Company's mechanical work and employees at Corbin, Kentucky, at Loyall, Kentucky, and at several other points on said Company's railroad line.

Affiant says that Glen B. Wolfe has seniority as a machinist at Loyall, Kentucky, from May 13, 1929; and that said Wolfe started working as a machinist at Loyall, Kentucky, for this defendant on May 13, 1929; that Robert S. Kallem has seniority as a machinist at Loyall, Kentucky, from October 4, 1926, and that said Kallem started working as a machinist at Loyall, Kentucky, for this defendant on October 4, 1926; that Pearl M. Shell has seniority as a machinist at Loyall, Kentucky, from August 19, 1926, and that said Shell started working as a machinist at Loyall, Kentucky, for this defendant on August 19, 1926; that Elijah J. Saylor has seniority as a machinist at Loyall, Kentucky, from June 27, 1926, and that said Saylor started working as a machinist at Loyall, Kentucky, for this defendant on June 27, 1926; that this affiant is informed that the plaintiff, John Walter Oakley, Jr., was discharged from the Armed Forces on

May 22, 1946; that during the time the said John Walter Oakley, Jr., was in the Armed Service he retained his position on the seniority list of machinists at Loyall, Kentucky, and that upon his discharge from the Armed Forces, his seniority as a machinist at Loyall, Kentucky, was the same as it was before he entered the Armed Service and that said seniority at Loyall, Kentucky, dates from July 6, 1943.

(S) H. FEATHER.

Subscribed and sworn to before me by H. Feather this the 12th day of May 1947.

(S) CHAS. DENHAM,

*Notary Public, Whitley County, Kentucky.*

Com. expires 4-19-1951.

17

In United States District Court

*Order*

Entered May 21, 1947

This day came System Federation No. 91 of the Railway Employees Department of the American Federation of Labor and tendered its motion for leave to intervene in this action and answer of intervener, and, the court being advised, it is ordered that the said motion be and the same is hereby sustained, and that the said System Federation No. 91 of the Railway Employees Department of the American Federation of Labor be permitted to intervene herein as party defendant, and that the answer of the said System Federation No. 91 be filed and noted of record.

(S) H. CHURCH FORD, *Judge.*

This order should be entered:

(S) ~~KIT C. ELSWICK,~~

*Attorney for Plaintiff,*

(S) C. S. LANDRUM,

*Attorney for Defendant,*

(S) STOLL, MUIR, TOWNSEND, PARK & MOHNEY,

*Attorneys for Intervening Petitioner.*

In United States District Court

*Motion of System Federation No. 91 of the Railway Employees' Department of the American Federation of Labor for leave to intervene*

Filed May 21, 1947

Now comes System Federation No. 91 of the Railway Employees' Department of the American Federation of Labor (hereinafter referred to as System Federation), acting in its own behalf and

in behalf of all employees of the defendant Louisville and Nashville Railroad Company (hereinafter referred to as Railroad Company) belonging to the craft of machinists, and moves the Court for leave to intervene as party defendant, to file its answer to the complaint of the plaintiff (a copy of which said answer is tendered to the Court herewith), and to participate fully  
 18 in all further proceedings herein as party defendant, and in support of its said motion, represents to the Court as follows, to wit:

1. The System Federation is an unincorporated association composed of local unions chartered by and affiliated with certain national and international labor organizations including, to wit: the International Association of Machinists, the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, the Sheet Metal Workers International Association, and the Brotherhood Railway Carmen of America, members of which said local unions are employees of the defendant Railroad Company and members of the crafts of employees known as machinists, boilermakers, sheet metal workers, and carmen, respectively. The said System Federation is the duly and legally selected representative through which said employees bargain collectively with the defendant Railroad Company. Since April 1, 1938, there have been in effect collective bargaining agreements between the System Federation and the Railroad Company, governing the terms and conditions of employment of the said employees and guaranteeing to them certain rights, seniority rights among others, and such an agreement is in effect at the present time.

The plaintiff in this action is seeking a judgment of this Court to the effect that since his discharge from the armed forces of the United States and his re-entry into the service of the defendant Railroad Company he has not been accorded the seniority status to which he was allegedly entitled after such discharge from the armed forces, and that he should be given such status. In the decision of the issues so presented, the Court will or may be called upon to interpret the collective bargaining agreements before mentioned. Any such interpretation so issued by this Court is a  
 matter of direct and vital concern to the System Federation.

19 2. The said System Federation has a further interest in the issues raised by this case by virtue of its position as collective bargaining representative of all members of the craft of machinists in the employ of the defendant Railroad Company. As such representative it is under moral and legal obligation to represent in good faith the interests of all said employees in all matters concerning the interpretation and application of its collective bargaining agreement with the defendant and to act in all circumstances to effectuate the bona fide contention of said em-

ployees as to the true meaning and intent of the said agreement. This motion is filed by the said System Federation in its own behalf and as collective bargaining representative as aforesaid in behalf of all members of the craft of machinists interested in the outcome of this action.

3. The applicant System Federation and the employees of defendant Railroad Company whom it represents will or may be bound by any judgment entered by the Court in this proceeding, and valuable rights of the employees whose interests are represented herein by the System Federation will or may be finally determined herein without any opportunity being given to them to be heard unless this motion is granted and the applicant is permitted to intervene in this case.

4. The interest of the defendant Railroad Company in the seniority rosters of its machinists extends only to the point that it desires to know certainly the order in which such employees are to be furloughed or restored to service in case of fluctuating in its requirements for employees of this type. The relative standing of any individual employee on such rosters is a matter of no financial interest to the defendant. In consequence, the interests of the employees represented by the applicant herein will or may be inadequately represented by any defense made by the defendant Railroad Company.

20 5. The defense proposed to be made by this applicant as evidenced by its proposed answer tendered herewith presents issues of law and fact in common with those of the original action.

Wherefore, in behalf of itself, and in behalf of the employees whose interests it represents, the applicant respectfully moves that the Court grant it leave to intervene in this proceeding, to file an answer herein, and to take such part in the further proceedings of this case as may be necessary and appropriate to protect its interests and the interests of those whom it represents.

(s) JAMES PARK,

*602 Bank of Commerce Bldg., Lexington, Kentucky,*

(s) RICHARD R. LYMAN,

*741 Nicholas Building, Toledo, Ohio,  
Attorneys for Applicant.*

Of Counsel:

STOLL, MUIR, TOWNSEND, PARK & MOHNEY,  
*602 Bank of Commerce Building,  
Lexington, Kentucky,*

MULHOLLAND, ROBIE & McEWEN,  
*741 Nicholas Building, Toledo, Ohio.*

Receipt is hereby acknowledged of a copy of the above motion, accompanied by a copy of an answer, proposed to be filed by the intervener, and further service of said motion and answer upon us is hereby waived.

May 19, 1947.

(S) KIT C. ELSWICK,  
*Attorney for Plaintiff.*

(S) C. S. LANDRUM,  
*Attorney for Defendant.*

21

In United States District Court

*Answer of Intervener*

Filed May 21, 1947

Now comes System Federation No. 91 of the Railway Employees' Department of the American Federation of Labor (hereinafter referred to as System Federation) and for answer to the complaint of the plaintiff herein says:

1. The allegations contained in Paragraph 1 of the complaint constitute conclusions of law and require no answer.

2. The allegations contained in Paragraph 2 of the complaint are admitted.

3. The allegations contained in Paragraph 3 of the complaint are admitted.

4. With respect to the allegations contained in Paragraph 4 of the complaint, it is admitted that beginning on or about July 1, 1938, until May 7, 1944, plaintiff was employed by the defendant, starting as apprentice at Louisville, Kentucky, and being promoted to machinist in 1941 at Louisville; and that in 1943 plaintiff left his position in the employ of defendant at Louisville, thereby surrendering any seniority or other rights which he may have had in and to such position at Louisville, and entered the employ of defendant in the position of machinist at Loyall, Kentucky, in which position he was employed at the time he entered the Armed Forces of the United States. Further answering said Paragraph 4, intervenor denies that plaintiff was transferred from Louisville to Loyall, and alleges that plaintiff voluntarily left his position at Louisville to take employment at Loyall.

Intervenor denies each and every allegation of said Paragraph 4 not herein expressly admitted to be true.

5. The allegations contained in Paragraph 5 of the complaint are admitted.

22 6. The allegations contained in Paragraph 6 of the complaint are admitted.

7. The allegations contained in Paragraph 7 of the complaint are admitted.

8. With respect to the allegations contained in Paragraph 8 of the complaint, it is admitted that plaintiff was reemployed by defendant on July 17, 1946, as a machinist at the rate of pay of \$1.22½ per hour; that this rate of pay reflected a wage increase of \$0.16½ per hour which had been given to all employees occupying positions equivalent to plaintiff's regardless of seniority; and that plaintiff was accorded seniority in the position in which he was reemployed as of July 17, 1946.

Intervener denies each and every allegation of said Paragraph 8 not herein expressly admitted to be true.

Further answering said Paragraph 8, intervener alleges that the position in which plaintiff was reemployed after his discharge from the Armed Forces, and to which reference is made in said Paragraph 8, was a position in the employ of defendant at Corbin, Kentucky; that plaintiff has been and still is accorded seniority as a machinist at Loyall, Kentucky, as of July 6, 1943, the date of his original employment at Loyall, with the privilege of returning to his former position at Loyall whenever, by operation of the seniority system in effect and which was in effect at the time plaintiff entered the Armed Forces, there is work available for him at Loyall.

9. The allegations contained in Paragraph 9 of the complaint are denied.

10. The allegations contained in Paragraph 10 of the complaint are admitted.

23 11. The allegations contained in Paragraph 11 of the complaint are denied.

All other allegations of the complaint not herein expressly admitted or denied are denied by this intervener.

Wherefore, having fully answered the complaint of the plaintiff, intervener prays that the same be dismissed and that it may have its costs and all other proper relief.

(S) JAMES PARK,

602 Bank of Commerce Building, Lexington, Kentucky,

(S) RICHARD R. LYMAN,

741 Nicholas Building, Toledo, Ohio.

Of Counsel:

STOLL, MUIR, TOWNSEND, PARK & MOHNEY,

602 Bank of Commerce Building, Lexington, Kentucky,

MULHOLLAND, ROBIE & McEWEN,

741 Nicholas Building, Toledo, Ohio.

In United States District Court

*Order*

Entered September 2, 1947

This case is assigned for argument at 10 A. M., on Wednesday, September 10, 1947, in the Federal Court Room in Lexington, Ky., upon the question whether, under the opinion of the Supreme Court in *The Trailmobile Company, et al., v. Whirls* (No. 85, April 14, 1947), the cause has been rendered moot by the expiration of the statutory year to which Section 8(c) of the Selective Training and Service Act limited plaintiff's right to any special or preferential standing in respect to restored seniority.

(S) H. CHURCH FORD, Judge.

24

In United States District Court

*Order sustaining motion to dismiss, etc.*

Entered September 12, 1947

This cause coming on to be heard on the motion of the intervening defendants to dismiss the cause on the ground that the question presented has become moot, because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant, L. & N. Railroad Company, and the Court being advised, it is ordered and adjudged that said motion be, and the same is hereby, sustained, and this action is now dismissed as moot, without cost to either the plaintiff, or the defendant, or the intervening defendants.

(S) H. CHURCH FORD, Judge.

In United States District Court

*Motion to dismiss*

Filed September 12, 1947

Come the intervening defendants and move the Court to dismiss this cause on the ground that the questions involved therein have become moot, because more than one year has elapsed since the date of the plaintiff's restoration to his employment with the defendant, Louisville and Nashville Railroad Company.

(S) WILLARD H. McEWEN,

Suite 741 Nicholas Building, Toledo, Ohio,

STOLL, TOWNSEND, PARK, MOHNEY & DAVIS,

602 Bank of Commerce Building, Lexington, Kentucky,

By (S) JOHN L. DAVIS,

Attorneys for Intervening Defendants.

25

In United States District Court

*Order filing notice of appeal and designation of record*

Entered December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and offers for filing Notice of Appeal and Designation of Record on appeal to the Circuit Court of Appeals for the Sixth Circuit.

It is Ordered that said Notice of Appeal and Designation of Record be and the same are now filed and noted of record.

(S) H. CHURCH FORD, Judge.

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, Clerk,

By H. W. PENNINGTON, D. C.

In United States District Court

*Notice of appeal to Circuit Court of Appeals for Sixth Circuit*

Filed December 3, 1947

Notice is hereby given that John Walter Oakley, Jr., plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit, from the order of the District Court for the Eastern District of Kentucky, entered September 12, 1947, dismissing this action.

(S) CLAUDE P. STEPHENS,

*United States Attorney, Eastern District of Kentucky,  
Attorney for Plaintiff.*

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, Clerk,

By H. W. PENNINGTON, D. C.

26

In United States District Court

*Designation of contents of record on appeal*

Filed December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, attorney for the appellant, and designates the entire record in this proceeding to be contained in the record on appeal.

(S) CLAUDE P. STEPHENS,

*United States Attorney, Eastern District of Kentucky,  
Attorney for Appellant.*

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, Clerk,

By H. W. PENNINGTON, D. C.

In United States District Court

*Order extending period for filing record on appeal*

Entered December 3, 1947

Upon motion of Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and attorney for the appellant, the Court being fully advised,

It is Ordered that the time for filing the record herein on appeal be and it is hereby extended to ninety (90) days from the date of the filing of the Notice of Appeal.

(S) H. CHURCH FORD, *Judge.*

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, *Clerk,*

By H. W. PENNINGTON, *D. C.*

27

In United States District Court

*Motion for order extending time for filing the record on appeal*

Filed December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, attorney for the appellant, and moves the Court for an order extending the period for filing and docketing the record herein on appeal to the Circuit Court of Appeals for the Sixth Circuit to ninety (90) days from the date of filing the Notice of Appeal, to wit: March 2, 1948.

CLAUDE P. STEPHENS,

*United States Attorney, Eastern District of Kentucky,*

*Attorney for Appellant.*

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, *Clerk,*

By H. W. PENNINGTON, *D. C.*

[Clerk's Certificate to foregoing transcript omitted in printing.]

28

In the United States Court of Appeals for the Sixth Circuit

*Cause argued and submitted*

October 15, 1948

Before: HICKS, Chief Judge, ALLEN, and McALLISTER, Circuit Judges

This cause is argued by Claude P. Stephens for appellant and by C. S. Landrum and Willard H. McEwen for appellee and is submitted to the court.

In United States Court of Appeals

Appeal from the District Court of the United States for the  
Eastern District of Kentucky

**JUDGMENT**

Entered November 22, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be and the same is hereby affirmed.

30 In United States Court of Appeals for the Sixth  
Circuit

No. 10648

[File endorsement omitted.]

JOHN WALTER OAKLEY, JR., APPELLANT

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEE

Appeal from the District Court of the United States for the  
Eastern District of Kentucky

Before HICKS, Chief Judge, and ALLEN and McALLISTER, Circuit  
Judges

*Opinion*

Filed Nov. 22, 1948

McALLISTER, Circuit Judge. Appellant commenced working for the Louisville and Nashville Railroad Company as an apprentice machinist at Louisville, Kentucky, on July 1, 1938, and in 1941, was promoted to the position of machinist at the same place. In 1943, he gave up his seniority rights in that place in order to be transferred to the yards of the railroad company at Loyall, Kentucky, as a locomotive machinist. On July 6, 1943, he began work in that capacity at Loyall and established seniority there as of that date. He continued in such employment until May 7, 1944, when he was inducted into the armed forces of the United States. Thereafter, he served in the army until May 22, 1946, when he was honorably discharged. While he was serving in

the army, the amount of machinist work had so decreased at Loyall that the railroad company, on July 1, 1945, reduced its force at that point. At that time, the machinists in the employ of the railroad company at Loyall were given the right to transfer to the shops at Corbin, Kentucky, and were given seniority at the latter place as of the date of their transfer.

31 Appellant, on June 1, 1946, within ninety days after his discharge from the army, applied for re-employment in the position which he occupied with the company at the time he was inducted into the armed services and asked for the seniority status and pay that he would have had if he had continued in the employ of the company in lieu of his service in the army. After appellant had made this application, he was re-employed as locomotive machinist at Corbin, Kentucky, on July 17, 1946, and was given seniority at that place as of that date. He thereafter filed his complaint against the company in the district court, claiming that under the Selective Service Act of 1940, he was entitled to seniority as of July 1, 1945, the date on which the other employees of the company at Loyall transferred to the shops at Corbin, to which point he states he would have transferred if he had not been in the armed services.

By order of the district court, System Federation No. 21 of the Railway Employees Department of the American Federation of Labor was granted leave to intervene, and thereupon moved to dismiss appellant's complaint on the ground that under Section 8 (c) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App., Section 308 (c), a veteran's right to restoration to employment without loss of seniority is terminated one year after such restoration; and that more than one year had elapsed since appellant had been restored to employment with the railroad company.

The district court dismissed appellant's petition on the ground that the statute in question controlled and that under its terms, appellant was not entitled to the relief claimed.

Section 8 (c) of the Selective Training and Service Act of 1940 provides:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be

discharged from such position without cause within one year after such restoration."

32 In *Trailmobile Co. et al. v. Whirls*, 154 F. 2d 866, this court had occasion to consider the above section of the statute and held that: "the last provision in paragraph (c), that the veteran 'shall not be discharged from such position without cause within one year after such restoration,' is a separate, distinct and independent benefit and should not be construed as limiting to one year the restoration of the veteran to his former position without loss of seniority. While he may not be discharged without cause within one year, if he is not so discharged he retains his seniority status as long as the Selective Training and Service Act in its present phraseology remains in effect." (Emphasis supplied.) The holding of this court in the foregoing case was, however, reversed by the Supreme Court in *Trailmobile Co. et al. v. Whirls*, 331 U. S. 40, in which it was held that the statutory protection afforded by Section 308 (c) which gave the re-employed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration to employment, was terminated one year after his restoration to service.

Appellant bases his right to the seniority claimed squarely upon the terms of the statute. He was entitled to restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed.

The judgment of the district court dismissing appellant's complaint is, accordingly, affirmed.

33 [Clerk's Certificate to foregoing transcript omitted in printing.]

34 Supreme Court of the United States

*Order allowing certiorari*

Filed April 4, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 29

JOHN S. HAYNES, PETITIONER

vs.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC  
RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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1 In District Court of the United States for the Eastern  
District of Kentucky, at London

No. 358

JOHN S. HAYNES, LURETHA, PULASKI COUNTY, KENTUCKY,  
PLAINTIFF

v.

SOUTHERN RAILWAY SYSTEM, FERGUSON SHOPS, SOMERSET,  
KENTUCKY, DEFENDANT

*Complaint*

2 Filed February 14, 1947

Plaintiff, John S. Haynes, alleges that:

1. This is a complaint under Section 8, Sub-Section (e), Selective Training and Service Act of 1940 (54 Stat. 890) 50 U. S. Code App., Section 308(e), as amended, (56 Stat. 724), and the jurisdiction of this Court is based on that section.

2. Plaintiff is a resident of the Eastern District of Kentucky, and resides at Luretha, Pulaski County, Kentucky.

3. The defendant is a corporation duly organized under the State of Virginia, and doing business in the Eastern District of Kentucky, carrying on the business of railroading.

4. Beginning on or about July 6, 1940, until February 1, 1942, plaintiff was employed by the defendant at Ferguson Shops, Somerset, Pulaski County, Kentucky, as a machinist helper.

5. Plaintiff was paid wages or salary for said employment by said defendant company during such period of employment at the rate of 72c per hour.

6. Plaintiff continued to work for and occupy said position in the employment of the defendant until February 1, 1942, at which time plaintiff enlisted in the Armed Forces of the United States and thereupon entered the military training and service of said Armed Forces. Plaintiff was registered with Selective Service Board of Registration, Local Board No. 142, Somerset, Kentucky, and his Order Number was 10228-A.

2 7. Plaintiff was honorably discharged from the Armed Forces of the United States on October 31, 1945, and on November 16, 1945, within ninety days after his discharge, applied to the defendant for reemployment in the position and employment he occupied with the defendant at the time of his enlistment in the Armed Forces, with like seniority and pay that he would have had, had he continued in the employment of the defendant and had not served in the Armed Forces of the United States for the time mentioned in the above paragraph.

8. Upon plaintiff's application for reemployment he was immediately reemployed on November 16, 1945 as machinist helper at the rate of 80c per hour, which was the same employment that he had at the time of his entry into the Armed Forces of the United States, and the increase given of 8c per hour was the increase given to machinist helpers irregardless of seniority; that said employment of machinist helper was not the employment to which he was entitled had he been given the seniority that he would have had, had he remained in the employment of the company during the period of his service in the Armed Forces.

9. Plaintiff states that during his service in the Armed Forces the defendant company promoted six helper machinists to helper apprentices, and that these six men were junior in seniority to himself, and that had he not entered the Armed Forces as above mentioned he would have been promoted to helper apprentice and would have been given the pay as such, and such promotion would have been in December 1942 or not later than February 1, 1943; that as such helper apprentice he would have been given one and one-half ( $1\frac{1}{2}$ c) cent increase in wages over and above that which was given the machinist helpers, and would have received a like raise every six months thereafter.

10. Plaintiff states that he is qualified to perform the duties of helper apprentice, and also physically able to perform said duties.

3 11. Plaintiff now alleges that he is entitled to be restored to the seniority that he would have had, had he not served in the Armed Forces of the United States for the time above mentioned, and that he was entitled to reemployment as helper apprentice on November 16, 1945, and entitled to the pay increase which helper apprentices have received since February 1, 1943, and that he would have been promoted to such helper apprentice had he not been in the Armed Forces of the United States.

Wherefore, plaintiff respectfully prays:

(a) That this Court adjudge and decree that the plaintiff is entitled to be restored to the seniority status which he would have had in his employment with the defendant company had he not served with the Armed Forces for the period of time mentioned herein;

(b) That this Court adjudge and decree that this plaintiff was entitled to be reemployed with the company as apprentice helper on December 16, 1945 and entitled to all pay increases given helper apprentices since February 1, 1943;

(c) That plaintiff recover of the defendant the increase in wages which he would have been entitled to receive had he upon his reemployment with the defendant company, on December 16, 1945,

been employed as helper apprentice with pay increases from February 1, 1943;

(d) That the plaintiff have such other and further relief as may be just and proper in the premises, including costs.

(S) KIT C. ELSWICK,  
*Assistant United States Attorney.*

The affiant, Kit C. Elswick, Assistant United States Attorney for the Eastern District of Kentucky, says that the statements contained in the foregoing Petition are true, as he verily believes.

(S) KIT C. ELSWICK.

Subscribed and sworn to before me by Kit C. Elswick, this 14th day of February 1947.

(S) A. B. ROUSE,  
*Clerk, U. S. Dist. Court.*

4 In United States District Court

*Summons*

Filed February 18, 1947

To the above named Defendant:

You are hereby summoned and required to serve upon Kit C. Elswick, Assistant U. S. Attorney, Post Office Bldg., Lexington, Ky. Plaintiff's Attorney, whose address, Lexington, Ky. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[SEAL]

(S) A. B. ROUSE, *Clerk.*

Date Feb. 14, 1947.

*Return on service of writ*

I hereby certify and return, that on the 14th day of Feb., 1947, I received the within summons with complaint attached, and on the same day I served it on the Southern Railway System by delivering a true copy with complaint attached to A. H. Judd, Asst. Baggage Agent, highest ranking officer available, at Lexington, Ky.

JOHN M. MOORE,  
*U. S. Marshal.*

By (S) CHAS. H. DUDLEY,  
*Deputy.*

In United States District Court

Order

Entered March 3, 1947

The time for defendant to file answer herein is hereby ordered extended for sixty days, namely, until May 5, 1947.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court,  
Eastern District of Kentucky.*

This order is agreed to:

(S) KIT C. ELSWICK,  
*Asst. U. S. Atty.*  
(S) BRADLEY & BRADLEY,  
*Attorneys for Defendant.*

5 In United States District Court

[Title omitted.]

Order

Entered May 6, 1947

This day came Bradley & Bradley, attorneys for the defendant in the above styled case, and tendered and offered for filing Certificate and Answer herein. The Court being advised it is Ordered that this certificate and Answer be filed and noted of record.

(S) H. CHURCH FORD, *Judge.*

6 In United States District Court

[Title omitted.]

Certificate

Filed May 6, 1947.

The undersigned hereby certify that they have this day sent, by registered mail, to the Federal Asst. District Attorney for the Eastern District of Kentucky, at Lexington, a copy of the attached answer.

This 2 May 1947.

[SEAL]

(S) BRADLEY & BRADLEY,  
*Attorneys for Defendant,*

By (S) J. C. BRADLEY.

Subscribed and sworn to before me by J. Craig Bradley, Jr., this 2 May 1947.

(S) DOROTHY EISON,  
*Notary Public, Scott Co., Ky.*

My com. expires 9/6/47.

7 In United States District Court

[Title omitted.]

*Answer*

Filed May 6, 1947

Comes now the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company, and for its answer to plaintiff's complaint, denies each and every affirmative allegation of said complaint, except so far as is specifically admitted as is hereinafter set out, to-wit:

That plaintiff is a resident of the eastern district of Kentucky and resides at Luretha, Pulaski County, Kentucky.

That defendant is a corporation duly organized under the State of Ohio and doing business in the eastern district of Kentucky, carrying on the business of railroading.

That on or about December 10, 1940, and until February 1, 1942, plaintiff was employed by defendant in Ferguson Shops, Pulaski County, Kentucky, as machinist helper.

That plaintiff was paid wages or salary for said employment by said defendant company during such period of employment at the rate of seventy-two (72c) cents per hour.

That plaintiff continued to work for and occupy said position of employment with the defendant until Feb. 1, 1942, at which time plaintiff enlisted in the armed forces of the United States and thereupon entered the military training and service of said armed forces. Plaintiff was registered with Selective Board of Registration, Local Board 142, Somerset, Ky., and his order number was 10228A.

8 That plaintiff was honorably discharged from the armed forces of the United States on Oct. 31, 1945, and in November, 1945, within ninety days after his discharge, applied to this defendant for reemployment in the position and employment he occupied with the defendant at the time of his enlistment in the armed forces, with like seniority.

That upon plaintiff's application for reemployment he was immediately reemployed on November 16, 1945, as machinist helper at the rate of eighty (80c) cents per hour, which was the same employment that plaintiff had at the time of his entry in the armed forces of the United States and the increase given of eight (8c) cents per hour was the increase given to machinist helpers regardless of seniority.

That during plaintiff's service in the armed forces, defendant company indentured six machinists helpers as helper apprentices

and that these six men were junior in seniority to plaintiff on the roster of machinist helpers.

## II

For further answer, defendant states that from the time plaintiff first started to work for this defendant, up to and including the present time, the employer and employee relationship between plaintiff and this defendant was and is governed by and is subject to rules and regulations set forth in the collective bargaining agreement between The Cincinnati, New Orleans and Texas Pacific Railway Company and other railroad companies and the International Association of Machinists and other interested organizations effective March 1, 1926. A copy of said agreement effective March 1, 1926, as reprinted as of December 27, 1943, is attached hereto and made a part of this answer, the same as if copied herein in full.

Rule 67 reads as follows:

### "67. Helper Apprentices

7 "Helpers who have had not less than two consecutive years' experience as machinist helper at the point where employed at the time application for apprenticeship is made, may become a helper apprentice.

9 When assigned as helper apprentices they must not be over thirty (30) years of age.

"Note: See memorandum of understanding dated October 9, 1940, reference to changing the words 'at the point employed' and 'in a Master Mechanic's territory' on page 111."

Rule 29 reads as follows:

### "39. Apprentices

"All apprentices must be able to speak, read, and write the English language and understand at least the first four rules of Arithmetic. Applicants for regular apprenticeship shall be between sixteen (16) and twenty-one (21) years of age, and, if accepted, shall serve four years of 290 days each calendar year. If retained in the service at the expiration of their apprenticeship, they shall be paid not less than the minimum rate established for journeymen mechanics of their respective crafts.

"In selecting helper apprentices, seniority shall govern, and they shall serve three years of 290 days each calendar year. All selections to be made in conjunction with the respective crafts shop committees.

"Note—See special rules of each craft for additional apprentice rules.

"Note: See memorandum of understanding, dated December 29, 1939, reference to age of apprentices on page 106."

Rule 69 reads as follows:

"69. The number of helper apprentices must not at any time exceed 50% of the combined number of regular and helper apprentices assigned."

Defendant states that under Rule 67, it is necessary and required that before a machinist helper is eligible for selection as a helper apprentice, he must have two years actual experience as  
10 machinist helper, time spent on furlough or leave of absence not being counted in said two year period.

Defendant states that under Rule 39 the accepted procedure and custom for the filling of vacancies in the classification of helper apprentice from machinist helper with two years experience is as follows:

(a) Applicant makes known his desire to be indentured to the master mechanic.

(b) When a vacancy occurs, the master mechanic calls in the helpers, who have so signified their desire for selection, for interview provided he is satisfied that the helper has shown an aptitude for the work.

(c) Consideration is given to applicant's educational qualifications.

(d) If approved preliminarily, applicant is given examinations and if grades are favorable, he is eligible for selection.

(e) The Respective Crafts Shop Committee is then consulted for recommendations and selections are made with their approval on the basis of seniority and ability.

Defendant states that at the time plaintiff went into the armed forces of the United States he had one year and two months experience as a machinist helper and that he did not have two years experience in such classification until September of 1946, that there did not exist at that time nor has there existed at any time since September 1946, any vacancies in the classification of helper apprentice. Defendant states that plaintiff did not make known to the master mechanic his desire to become a helper apprentice, that he had not been interviewed by said master mechanic or shown aptitude for the higher classification, that he has not taken his examination for said classification and that his qualifications have not been shown to or approved by the master mechanic or the Crafts Shop Committee.

Defendant states further that by established rules and custom when an employee is on "leave of absence or furlough," said employee is not entitled to any promotions or vacancies that might  
11 occur while he is on said leave of absence or furlough and that said employee has no right of complaint if

said vacancy or promotion is awarded to an employee who is junior to him.

Defendant states that when plaintiff left its employment for service in the armed forces of the United States, plaintiff was employed as a machinist helper with seniority date as such of Dec. 10, 1940, that when plaintiff applied for reemployment with this defendant on Nov. 16, 1945, plaintiff was immediately re-employed as machinist helper with seniority date as such of Dec. 10, 1940, with all wage increases that occurred in this classification during plaintiff's absence; that such reemployment is restoration of plaintiff to such position as required by Section 8, Sub-Sec. (b) and (c) of the Selective Training and Service Act of 1940 (54 Stat. 890) 50 U. S. Code App., Section 308 (b) and (c) as amended (56 Stat. 724).

### III

Without waiving any of its rights or defenses as set out in paragraphs I and II of its answer, defendant states that should the court decide that plaintiff is entitled to the classification of helper apprentice with a seniority in such classification above that of the date of the first junior helper selected as a helper apprentice during his absence while serving in the armed forces, which was April 16, 1943, then and in that event plaintiff's rate of pay would be the minimum helper rate for the first six months, beginning November 16, 1945, the date of plaintiff's reemployment, with an increase of two cents per hour for every six months thereafter. Rule 70 of the collective bargaining agreement referred to above and made a part of this answer reads as follows:

"70. Helper apprentices shall receive the minimum helper rate for the first six months, with an increase of 2c per hour for every six months thereafter until they have served three years."

The uniform interpretation of this rule is to the effect that the increase in pay for each six months period depends upon six month periods of actual experience and does not  
12 accrue to an employee of such classification while on leave of absence or furlough.

Wherefore, having fully answered, the defendant prays that the complaint of the plaintiff be dismissed and it prays for its costs herein expended; and it further prays that in the event it is adjudged that plaintiff is entitled to the classification of machinist apprentice with seniority date as of April 16, 1943, then and in that event it prays that plaintiff's recovery be limited in accordance with the allegations contained in paragraph III of

this answer; and defendant further prays for all other proper and equitable relief.

(S) BRADLEY & BRADLEY,  
*Attorneys for Defendant.*

In United States District Court

[Title omitted.]

*Order*

Entered May 12, 1947

By agreement of counsel, for the plaintiff and defendant, the above styled case is continued for further orders of the Court.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court.*

13 In United States District Court

[Title omitted.]

*Order*

Entered June 16, 1947

Came System Federation No. 21 of Railway Employees' Department of American Federation of Labor, and Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall, and J. L. Green and filed their motion for leave to intervene herein, and tendered therewith their answer as intervening defendants, the filing of which motion and the tendering of said answer is hereby noted of record herein.

It is now ordered by the Court that said motion to intervene be and the same is hereby assigned for hearing in the Federal Court Room at Lexington, Kentucky, on Friday, June 27, 1947, at ten (10) o'clock a. m.

(S) H. CHURCH FORD,  
*Judge, U. S. District Court.*

14 In United States District Court

*Motion of System Federation No. 21 of Railway Employees' Department of American Federation of Labor, and Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall, and J. L. Green for leave to intervene*

Filed June 16, 1947

Now come System Federation No. 21 of the Railway Employees' Department of the American Federation of Labor (hereinafter referred to as System Federation), acting in its own behalf and in behalf of all employees of the defendant railroad company belonging to the craft of machinists, and Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall and J. L. Green, and move the Court for leave to intervene as parties defendant herein to file their answer to the complaint of the plaintiff (a copy of which said answer is tendered to the Court herewith), and to participate fully in all further proceedings herein as parties defendant, and in support of their said motion, represent to the Court as follows, to-wit:

1. The System Federation is an unincorporated association composed of local unions chartered by and affiliated with certain national labor organizations, to-wit, the International Association of Machinists, the International Brotherhood of Blacksmiths, Drop Forgers and Helpers, the Brotherhood Railway Carmen of America, the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, the Sheet Metal Workers' International Association, and the International Brotherhood of Electrical Workers, members of which said local unions are the employees of the defendant Cincinnati, New Orleans and Texas Pacific Railroad Company and members of the crafts of employees known as machinists, blacksmiths, carmen, boilermakers, sheet metal workers, and electrical workers, respectively, the  
 15 craft of machinists including among others machinist helpers and machinist apprentices. The System Federation is the duly and legally selected representative through which the said employees bargain collectively with the defendant railroad company. Since March 1, 1926 the said System Federation has been a party to a collective bargaining agreement with the said defendant railroad company, governing the terms and conditions of employment of the said employees, establishing the method of selecting apprentices, and guaranteeing to employees certain rights, seniority rights among others.

The plaintiff in this action is seeking a judgment of this Court to the effect that prior to his induction into the armed forces of the United States, he was the holder of certain alleged seniority rights, and that since his discharge from the armed forces and his reentry into the service of defendant railroad company he has not been restored to the position to which his alleged seniority rights are said to entitle him. In the decision of the issues so presented, this Court will or may be called upon to interpret the collective bargaining contract before mentioned. Any such inter-

pretation so issued by this Court would be a matter of direct and vital concern to the System Federation.

The said System Federation has a further interest in the issues raised by this case by virtue of its position as collective bargaining representative of all members of the craft of machinists, to-wit, machinist helpers and machinist apprentices among others, in the employ of defendant railroad company. As such representative it is under moral and legal obligation to represent in good faith the interests of all said employees in all matters concerning the interpretation and application of its collective bargaining agreement with the defendant railroad company, and to act in all circumstances to effectuate the bona fide contention of said employees as to the true meaning and intent of the said agreement. This motion is filed by the said System Federation in its own behalf and as collective bargaining representative as aforesaid, in behalf of all members of the craft of machinists interested in the outcome of this action.

16 2. Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall and J. L. Green are employees of the defendant railroad company in the capacity of machinist apprentices, and now occupy positions on the seniority roster of apprentices above that presently occupied by the plaintiff and below that which he seeks to have assigned to him in this action. If the prayer of the complaint herein is granted, these said individual applicants will suffer loss in their relative seniority positions as machinist apprentices and in their opportunities to obtain and retain active employment in such capacity, with the defendant railroad company.

3. The applicants System Federation, and Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall, and J. L. Green will or may be bound by any judgment entered by the Court in this proceeding, and valuable rights of the individual applicants and other employees whose interests are represented herein by the System Federation will or may be finally determined herein without any opportunity being given to them to be heard unless this motion is granted and they are permitted to intervene in this case.

4. The interest of the defendant railroad company in the seniority roster of its machinist apprentices extends only to the point that it desires to know certainly the order in which such employees are to be furloughed or restored to service in case of fluctuations in its requirements for employees of this type. The relative standing of any individual employee on such rosters is a matter of no financial interest to the defendant company. In consequence the

interest of the applicants herein will or may be inadequately represented by any defense made by the defendant company.

17 5. The defense proposed to be made by these applicants as evidenced by their proposed answer tendered herewith presents issues of law and fact in common with those of the original action.

Wherefore, in behalf of themselves, and in behalf of the employees whose interests these parties represent, the moving parties respectfully move that the Court grant them leave to intervene in this proceeding, to file an answer herein, and to take such part in the further proceedings of this case as may be necessary and appropriate to protect their interests and the interests of those whom they represent.

(S) JAMES PARK,  
602 Bank of Commerce Bldg.,  
Lexington, Kentucky.

(S) WILLARD H. McEWEN,  
741 Nicholas Building, Toledo, Ohio.

Of Counsel:

• STOLL, MUIR, TOWNSEND, PARK AND MOHNEY,  
602 Bank of Commerce Building, Lexington, Kentucky.  
MULHOLLAND, ROBIE & McEWEN,  
741 Nicholas Building, Toledo, Ohio.

18 The motion of System Federation No. 21 of Railway Employees' Department of American Federation of Labor, etc., for leave to intervene and their answer as intervening defendants have been served upon the plaintiff, John S. Haynes and the defendant, Cincinnati, New Orleans, & Texas Pacific Railway Company by delivering or mailing a copy thereof to their respective attorneys of record herein.

This the 16th day of June 1947.

(S) WILLARD H. McEWEN,

(S) JAMES PARK,

Attorneys for System Federation No. 21 of Railway Employees' Department of American Federation of Labor, etc.

In United States District Court

[Title omitted.]

Order

Entered June 17, 1947

Pursuant to order entered herein on June 16th, 1947, this cause came on for hearing on the Motion for leave to intervene by System Federation of Labor, and Glen E. Groves, Harold L. Newell,

George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall and J. L. Green, the attorneys being present and no objection being raised to the motion, it is Ordered that the motion to intervene be sustained and the answer filed.

(S) H. CHURCH FORD,  
Judge, U. S. District Court.

19

In United States District Court

[Title omitted.]

*Answer of System Federation No. 21 of Railway Employees' Department of American Federation of Labor, Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall, and J. L. Green, intervening defendants*

Filed June 16, 1947

Now come intervening defendants System Federation No. 21 of the Railway Employees' Department of the American Federation of Labor (hereinafter referred to as System Federation), and Glen E. Groves, Harold L. Newell, George Beasley, Jr., George Earl Denham, Robert S. Coleman, Marion J. Mullenix, C. L. Francis, Sammie Frei, C. A. Hall, and J. L. Green, and for their answer to the complaint filed herein, say that: they admit the truth of certain allegations in the complaint as follows, to-wit:

That plaintiff is a resident of the Eastern District of Kentucky and resides at Luretha, Pulaski County, Kentucky.

That defendant railroad company is a corporation duly organized under the laws of the State of Ohio and doing business in the Eastern District of Kentucky, carrying on the business of railroading.

20 That beginning on or about December 10, 1940, and until February 1, 1942, the plaintiff was employed by the defendant railroad company at Ferguson Shops, Somerset, Pulaski County, Kentucky, as a machinist helper.

That the plaintiff was paid wages or salary for said employment by said defendant railroad company during such period of employment at the rate of 72 cents per hour.

That plaintiff continued to work for and occupy said position in the employment of defendant railroad company until February 1, 1942 at which time plaintiff enlisted in the armed forces of the United States and thereupon entered the military training and service of said armed forces, and that plaintiff was registered with Selective Service Board of Registration, Local Board No. 142, Somerset, Kentucky, and his Order Number was 10228-A.

That plaintiff was honorably discharged from the armed forces of the United States on October 31, 1945, and in November, 1945, within ninety days after his discharge, applied to the defendant railroad company for reemployment in the position and employment he occupied with the defendant at the time of his enlistment in the armed forces.

That upon plaintiff's application for reemployment he was immediately reemployed by the defendant railroad company on November 16, 1945 as machinist helper at the rate of 80 cents per hour, which was the same employment that he had at the time of his entry into the armed forces of the United States and the increase of eight cents per hour was the increase given to machinist helpers regardless of seniority.

That during the plaintiff's service in the armed forces the defendant railroad company indentured six machinist helpers as machinist apprentices, and that these six men were junior to the plaintiff in seniority on the roster of machinist helpers.

Further answering, these defendants deny each and every allegation of the complaint not specifically admitted herein to be true.

21 Wherefore, having fully answered the complaint herein, these intervening defendants pray that the same be denied and dismissed at the plaintiff's cost.

(S) JAMES PARK,

*602 Bank of Commerce Building, Lexington, Kentucky.*

(S) WILLARD H. McEWEN,

*741 Nicholas Bldg., Toledo, Ohio.*

Of Counsel:

STOLL, MUIR, TOWNSEND, PARK & MOHNEY, . .

*602 Bank of Commerce Building, Lexington, Kentucky,*

MULHOLLAND, ROBIE & McEWEN,

*741 Nicholas Building, Toledo, Ohio.*

In United States District Court

*Motion to dismiss complaint*

Filed September 12, 1947

Come the intervening defendants and move the Court to dismiss this cause on the ground that the questions involved therein have become moot, because more than one year has elapsed since the date of the plaintiff's restoration to his employment with the

defendant, Cincinnati, New Orleans and Texas Pacific Railway Company.

(S) WILLARD H. McEWEN,  
Suite 741 Nicholas Building, Toledo, Ohio,  
STOLL, TOWNSEND, PARK, MOHNEY, & DAVIS,  
602 Bank of Commerce Building, Lexington, Kentucky,  
By (S) JOHN L. DAVIS,  
*Attorneys for Intervening Defendants.*

22

In United States District Court

*Order sustaining motion to dismiss*

Entered September 12, 1947

This cause coming on to be heard on the motion of the intervening defendants to dismiss this cause on the ground that the question presented has become moot, because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant, Cincinnati, New Orleans and Texas Pacific Railway Company, and the Court being advised, it is ordered and adjudged that said motion be, and the same is hereby, sustained, and this action is now dismissed as moot, without cost to either the plaintiff, or the defendant, or the intervening defendants.

(S) H. CHURCH FORD, *Judge.*

In United States District Court

*Order filing notice of appeal and designation of record*

Entered December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and offers for filing Notice of Appeal and Designation of Record on appeal to the Circuit Court of Appeals for the Sixth Circuit.

It is Ordered that said Notice of Appeal and Designation of Record be and the same are now filed and noted of record.

(S) H. CHURCH FORD, *Judge.*

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, *Clerk.*

By H. W. PENNINGTON, *D. S.*

In United States District Court

*Notice of appeal to Circuit Court of Appeals for Sixth Circuit*

Filed December 3, 1947

Notice is hereby given that John S. Haynes, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit, from the order of the District Court for the Eastern District of Kentucky, entered September 12, 1947, dismissing this action.

(S) CLAUDE P. STEPHENS,  
*United States Attorney, Eastern District of Kentucky,  
Attorney for Plaintiff.*

In United States District Court

*Designation of contents of record on appeal*

Filed December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, attorney for the appellant, and designates the entire record in this proceeding to be contained in the record on appeal.

(S) CLAUDE P. STEPHENS,  
*United States Attorney, Eastern District of Kentucky,  
Attorney for Appellant.*

In United States District Court

*Motion for order extending time for filing the record on appeal*

Filed December 3, 1947

Comes Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, attorney for the appellant, and moves the Court for an order extending the period for filing and docketing the record herein on appeal to the Circuit Court of Appeals for the Sixth Circuit to ninety (90) days from the date of filing the Notice of Appeal, to-wit: March 2, 1948.

(S) CLAUDE P. STEPHENS,  
*United States Attorney, Eastern District of Kentucky,  
Attorney for Appellant.*

In United States District Court

*Order extending period for filing record on appeal*

Entered December 3, 1947

Upon motion of Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and attorney for the appellant, the Court being fully advised,

It Is Ordered that the time for filing the record herein on appeal be, and it is hereby extended to ninety (90) days from the date of the filing of the Notice of Appeal.

(S) H. CHURCH FORD, Judge.

Certified:

[SEAL, U. S. D. C., E. D. KY.]

A. B. ROUSE, Clerk.

By H. W. PENNINGTON, D. C.

25 [Clerk's Certificate to foregoing transcript omitted in printing.]

26 In the United States Court of Appeals for the Sixth Circuit

*Cause argued and submitted*

October 15, 1948

Before HICKS, Chief Judge, ALLEN and McALLISTER,  
Circuit Judges

This cause is argued by Claude P. Stephens for appellant and by C. J. Petzhold and Willard H. McEwen for appellee and is submitted to the court.

In United States Court of Appeals

*Judgment*

Entered November 22, 1948

The above cause coming on to be heard on the transcript of the record, briefs of the parties, and argument of counsel in open court, and the court being duly advised,

Now, therefore, it is hereby ordered that the judgment of the district court be and is hereby affirmed upon the authority of John Walter Oakley, Jr. v. Louisville and Nashville Railroad Company, — F.2d — (C. A. 6) decided this day.

18 HAYNES VS. CINCINNATI, N. O. AND TEXAS PAC. RY. CO.

27 [Clerk's Certificate to foregoing transcript omitted in  
printing.]

28 Supreme Court of the United States

*Order allowing certiorari*

Filed April 4, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 578**

**JOHN WALTER OAKLEY, JR.**

**v.**

**LOUISVILLE & NASHVILLE RAILROAD CO.**

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**No. 579**

**JOHN S. HAYNES**

**v.**

**SOUTHERN RAILWAY SYSTEM**

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**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SIXTH CIRCUIT**

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The Solicitor General, on behalf of John Walter Oakley, Jr., and John S. Haynes, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cases on November 22, 1948,

## OPINIONS BELOW

The opinion of the district court in *John Walter Oakley, Jr. v. Louisville & Nashville Railroad Co.* (OR. 24)<sup>1</sup> is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (OR. 28-31) is reported at 170 F. 2d 1008. The opinion of the district court in *John S. Haynes v. Southern Railway System* (HR. 22), is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (HR. 26) has not yet been reported.

## JURISDICTION

The judgments of the Court of Appeals in *John Walter Oakley, Jr. v. Louisville & Nashville Railroad Co.* (OR. 28) and in *John S. Haynes v. Southern Railway System* (HR. 26) were entered on November 22, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the end of the veteran's first year of reemployment terminates all protection, including access to the courts, afforded veterans by Section 8 of the Selective Training and Service Act.

2. Whether the veteran's first year of reemployment can be regarded as terminated before

<sup>1</sup> References to the record in *John Walter Oakley, Jr., v. Louisville & Nashville Railroad Co.* will be indicated by "OR", and in the *John S. Haynes v. Southern Railway System*, by "HR".

he has been restored to the position to which he is entitled under Section 8.

#### STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. \* \* \*

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

\* \* \* \* \*

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of

like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so ;

\* \* \* \* \*

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

\* \* \* \* \*

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any

such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

\* \* \* \* \*

**STATEMENT**

On February 14, 1947, John S. Haynes, the petitioner in No. 579, instituted an action under Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 53 Stat. 798, 50 U. S. C. App. 308 (hereafter referred to as "the Act") in the District Court of the United States for the Eastern District of Kentucky (HR. 1-3).

His complaint set forth the following facts: Prior to his enlistment in the armed forces on February 1, 1942, he had been employed as a machinist helper by the Southern Railroad System at Somerset, Kentucky. Within ninety days after

his discharge from the armed forces, he applied for reemployment with that employer and was re-employed as a machinist helper on November 16, 1945. During the three years that he had been in the armed forces, several openings had occurred in the position of helper apprentice, a higher paid position, for which machinist helpers were eligible on the basis of seniority, and between December, 1942 and February, 1943, six machinist helpers junior to him in seniority had become helper apprentices. On the basis of his relative seniority he, too, would have been promoted no later than February 1943, had he not been serving in the armed forces. Consequently, he claimed to be entitled to reemployment as a helper apprentice with seniority as of February 1943. The complaint prayed for a judgment restoring petitioner to the seniority status he would have had but for his service in the armed forces, determining his right to the position and pay of a helper apprentice, and awarding him the wages he had lost because of the failure of the respondent to make him a helper apprentice on December 16, 1945, upon his reemployment with the company after his return from the armed forces (HR 3).

An answer was filed by the respondent railroad company alleging that plaintiff had been given the "same employment" as he had left. Further, the answer denied that, under the terms of the collective bargaining agreement between the railroad

company and the International Association of Machinists governing the employment relationship between petitioner and respondent, petitioner was entitled to reinstatement as a helper apprentice, since he lacked two years experience as a machinist helper and, in addition, had not taken the various steps necessary for his promotion to the higher position (HR. 7-12).

System Federation No. 21 of the Railroad Employees Department of the American Federation of Labor, the collective bargaining representative which had negotiated the contract set out in the railroad company's answer, was permitted upon its own motion to intervene and file an answer in the proceeding which, in effect, simply denied the allegations of the complaint as to petitioners' right to the position of helper apprentice (HR. 14-21).

John Walter Oakley, Jr., the petitioner in No. 578, instituted an action on April 14, 1947, in the same district court as had Haynes, likewise seeking relief under Section 8 of the Act (OR. 1-3). His complaint alleged: Prior to his induction in the armed forces on May 7, 1944, he had been working as a locomotive machinist for the Louisville and Nashville Railroad Company at Loyall, Kentucky. During his absence, the Loyall shop was transferred to Corbin, Kentucky, and had he not been in the armed forces, he would have been transferred with it and given seniority at Corbin as of that date, July 1, 1945. He was discharged from the armed forces

on May 22, 1946 and within ninety days, applied for reemployment to his previous position or to one of like seniority, status and pay. He was reemployed as a locomotive machinist at Corbin, Kentucky on July 17, 1946 with seniority as of that date, whereas he was entitled to seniority as of July 1, 1945 which was the seniority he would have had but for his service in the armed forces. Because he was denied his proper seniority rating, he was required to work the evening, rather than the day shift, and may even be laid off (OR. 2-3). He asked the court for a judgment declaring his seniority to be from July 1, 1945.

The respondent railroad company filed an answer denying that petitioner was entitled to any seniority other than that which he had been given (OR. 10-12). Simultaneously it requested petitioner to admit certain facts, including the terms of a collective bargaining agreement, relating to the transfer of laid-off employees and seniority, and the existence and terms of a "Memorandum of Understanding Protecting Seniority of Employees Entering Military or Naval Service" entered into between it and the International Association of Machinists through System Federation No. 91, Railroad Employees Department, American Federation of Labor, which provided that a returning veteran should be restored to such position as "his accumulated seniority entitled him \* \* \* the same as if he had remained in the service." (OR. 5-9).

Petitioner made certain of the admissions requested and denied the remainder because of insufficient knowledge as to their truth or falsity (OR. 13-14). Neither the facts admitted or denied are material to this petition.

On May 21, 1947 System Federation No. 91 was permitted to intervene on its own motion and filed an answer denying in substance the allegations of the complaint (OR. 17-23).

On September 2, before evidence had been taken in either of these two cases, the district court on its own motion assigned for argument the question as to whether under the authority of *Trailmobile v. Whirls*, 331 U. S. 40, the proceeding brought by John Walter Oakley, Jr. against the Louisville and Nashville Railroad Company had been rendered moot (OR. 23). On September 12th, the intervening union filed a formal motion of dismissal in both the *Oakley* and the *Haynes* actions and an order was entered in each case dismissing it on the ground "that the question presented has become moot, because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant." (OR. 24; HR. 21-22).

The Court of Appeals for the Sixth Circuit affirmed both judgments on appeal (OR 28; HR 26). The opinion in the *Oakley* case, which was also the authority for the judgment in the *Haynes* case, (HR. 26), stated that petitioner "was entitled to

restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed." (OR. 30).

#### SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred:

1. In holding that the protection within the framework of the seniority system, given a veteran by the Act, including the right to the same position in the employ of the employer whose employ he left in order to enter the armed forces, as is enjoyed by non-veterans with the same or less seniority who remained behind, and which position he would have occupied but for his military service, terminates one year after his reemployment.

2. In holding that the acceptance for one year by a veteran of a position inferior to that to which he is entitled terminates his claim to the protection of the Act and even divests him of an accrued right to wages lost by reason of his employer's violation of that Act.

3. In holding that the decision of this Court in *Trailmobile Co. v. Whirls*, 331 U. S. 40, compelled dismissal of these actions.

4. In affirming the judgment of the district court dismissing these actions.

REASONS FOR GRANTING THE WRIT

I

1. The judgments of the court below in these two cases stand for the following constructions of Section 8 (c) of the Selective Training and Service Act of 1940:

a. that the veteran's right to be restored to his job without loss of seniority is lost by accepting one year of reemployment in any job;

b. that the protection of veteran's seniority rights by Section 8 (c) terminates completely after one year of employment, even as against discrimination in favor of non-veterans;

c. that the expiration of one year of reemployment cuts off a veteran's right to recover in damages the difference in compensation resulting from failure to restore him "without loss of seniority".

The court below based its decision entirely upon this Court's decision in *Trailmobile Co. v. Whirls*, 331 U. S. 40. The underlying rationale of the decisions below can only be that "all protection afforded by virtue of Section 8 (c) terminates with the ending of the specified year," a proposition which this Court specifically refused to decide in the *Whirls* case. 331 U. S. at 60. Similarly, this Court stated in *Whirls* that, "We expressly reserve decision upon whether the statutory security ex-

tends beyond the one-year period to secure the re-employed veteran against impairment in any respect of equality with such a fellow worker." *Ibid.* It is these questions which were reserved in *Whirls* which the court below has resolved solely on the authority of the *Whirls* decision. On that ground alone, the judgments should be reversed.

2. In both of these cases, judgments were entered dismissing the complaints before trial as moot. In that posture of the cases, the petitioner veterans allege that their seniority entitled them upon return from military service to better jobs than those in which they were reemployed. In computing their seniority, both petitioners count as time on the job their respective periods of military service.<sup>2</sup> Neither petitioner has at any time sought any form of super-seniority over non-veterans. Rather, each alleges that upon returning from military service he was reemployed in a posi-

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<sup>2</sup> Not only is this in accordance with this Court's construction of Section 8 (c) in *Fishgold v. Sullivan Corp.*, 328 U. S. 275, restated with approval in the *Whirls* case, but that construction has been approved by Congress and embodied in Section 9 (c) (2) of the Selective Service Act of 1948 (Public Law 759, 80th Cong.) as follows:

It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

See Sen. Rep. 1268, 80th Cong., 2d Sess. (1948) 16.

tion which was inferior to that which he would have had if he had remained on the job instead of serving in the armed forces.

Specifically, Oakley, who was reemployed as a locomotive machinist at Corbin, with seniority as of the date of his reemployment, contends that he is entitled to seniority as of July 1, 1945, the date during his absence on which he would have been transferred to Corbin. Oakley asserts that the result of this loss of seniority has been to relegate him to night work and, more important, to put him in a more vulnerable position with respect to layoffs.<sup>3</sup> Haynes, who was reemployed in his previous position of machinist helper, alleges that had he remained on the job he would have been promoted to helper apprentice with higher pay, as were six non-veterans who had less than his seniority at the time he entered the armed forces. Oakley commenced his suit within the first year of reemployment, and Haynes three months after the expiration of that year.

The only application which this Court has given to the one-year clause of Section 8 (c) in relation to seniority rights is the holding of the *Whirls* case that after the first year of reemployment veterans'

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<sup>3</sup> That this concern of Oakley is not merely hypothetical is evidenced by the report in the New York Times for February 13, 1949 that more than 100,000 railway workers, or approximately 10 per cent of the total working force of the industry, are unemployed, and that the furloughing of workers has been especially heavy in the shops and maintenance departments.

seniority rights may be modified by a collective bargaining agreement which does not discriminate against veterans. The issue in the *Whirls* case was the duration of the veteran's "preferred standing over employees, not veterans having identical seniority rights." 331 U. S. at 60. Such preferred standing, this Court held, terminates with the ending of the statutory year. The decisions below go far beyond to hold that the "protection within the framework of the security system" of the veteran's position on the seniority escalator endures for only the first year of reemployment. The obvious and direct result is to make Section 8 (c) a dead letter for most veterans of World War II.

Of course, if Congress had intended such a result, it would have been easy merely to say that each returning veteran should be reemployed at his old job for one year. Instead, Congress provided in detail that "such employer shall restore such person to such position or to a position of like seniority, status, and pay" and that he "shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules" etc. The only possible purpose of these provisions is to provide permanent protection to the veteran's job seniority and status in their practical implications.

It is clear that Congress in framing the legislation conceived of it as protecting the veteran coming from organized industry from being discrim-

inated against at any time after his reemployment because of the time spent in the service, not simply for one year. This appears from the stress placed on the protection given pension and retirement rights. As explained by Senator Sheppard, Chairman of the Senate Military Affairs Committee which drafted the legislation, Section 8 (c), which is the source of the protection afforded the veteran against prejudice to his seniority rights by reason of his absence in the service, was intended "to prevent loss of seniority, accrued employment benefits, including participation in insurance, pension, bonus, and other beneficial programs." 86 Cong. Rec. 10095. Representative May, Chairman of the House Military Affairs Committee, explained its purpose to be (86 Cong. Rec. 11702):

\* \* \* to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Clearly, men drafted for a year of service would not be eligible for pensions or retirement until many years after their return to employment. Congress was concerned that when that time came, they should not be placed at a disadvantage, as compared to their colleagues, by reason of their service

in the armed forces. Nothing could more clearly negate an intention to limit the protection given seniority rights to the year of statutory employment.

The construction placed on this Act by the court below, which refused, because a year had elapsed since petitioners were reemployed, to pass upon their claims that they have not been restored to equality within the framework of the seniority system with non-veteran employees comparably situated, completely defeats the purpose of the Act, referred to repeatedly by this Court in both the *Fishgold* and *Whirls* cases, to protect the veteran against being penalized by his service to the nation.<sup>4</sup> In highly organized industries, such as

<sup>4</sup> *Fishgold v. Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285).

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

*Trailmobile Co. v. Whirls*, 331 U. S. 40:

"The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41).

"That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work

that in which petitioners are employed, seniority rights determine almost every aspect of employment, including promotions, retirement, pension rights, lay-offs, discharges and transfers. If, after the expiration of the statutory year, the veteran cannot appeal to the courts for protection against a refusal to credit the time spent by him in the service toward such rights, he has been permanently and most seriously "penalized by reason of his absence from his civilian job." 328 U. S. at p. 284.

The decisions below hold that petitioners having been reemployed for a year with less than the

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until the date of his reemployment without going into the service" (p. 56).

"The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58).

"The restored veteran, it was held, could not be disadvantaged by his service to the nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'" (p. 58).

*Dissenting opinion in Trailmobile case:*

"In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away" (p. 62).

"The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services" (p. 63).

"In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement" (p. 63):

seniority which they claim may not thereafter obtain judicial determination and enforcement of their seniority rights. This means that if a returning veteran accepts a job of lower seniority or other status than he believes he is entitled to under the Act, he must take the risk that unless within the first year of reemployment he obtains recognition of his claim it is gone forever. The incentive thus created for a veteran to draw unemployment benefits until his claim for restoration is finally resolved, instead of taking the offered job in the meantime, is obvious. We do not believe that Congress ever intended such a result. And yet this is the result of converting the one-year limitation in the last clause of Section 8 (c) from a limitation upon the veteran's *preferred* position against discharge, into a general (and short) period of limitation on enforcement of the rights against discrimination conferred by the other provisions of the section.

The necessary implication of the decision is that Section 8 (c) gives no protection to the veteran's seniority rights after the first year of reemployment. Such a conclusion is inconsistent with the legislative concern to protect such rights. It is inconsistent with this Court's construction that the time spent in military service must be counted as time on the job in computing seniority—a construction which Congress has expressly ratified. Yet the court below has necessarily held that after the first year of reemployment (Section 8 (c)) does

not protect the veteran by requiring that such service-acquired seniority be counted in connection with such matters as promotions and layoffs. We think it clear that Section 8 (c) protects indefinitely the veteran's rights within the framework of a seniority system and that this protection extends to the inclusion of service-acquired seniority in the computations of seniority for the purposes of the seniority system.<sup>5</sup> While a veteran's seniority rights may be modified after the first year of reemployment by arrangements which do not discriminate against him, they may not, as alleged here, be simply ignored.

The decision below in the *Haynes* case that upon the expiration of the first year of reemployment the veteran cannot recover from the employer the

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<sup>5</sup> This Court, in *Trailmobile v. Whirls*, 331 U. S. 40, has indicated its belief that Congress did not intend to limit to a year the protection given seniority rights:

"The restored veteran, it was held, could not be disadvantaged by his service to the nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. at 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence.' It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment." (p. 58)

Dissenting opinion in *Trailmobile* case:

"Congress limited the right to have a job to a year. But Congress, having assured a veteran the priority status he would have had had he remained at work, did not take away that status at the end of twelve months." (pp. 62-63)

difference in compensation resulting from failure to restore him to the job to which he was entitled, is even more startling. It is common knowledge that a principal inducement or sanction for compliance with the reemployment provisions of Section 8 has been the potential liability for failure to restore the veteran to the job to which he was entitled. Even assuming with the court below that these restoration rights endure for only the first year of reemployment, it does not follow that the cause of action for the amount of the veteran's financial loss from violation of those rights must be determined within that year, rather than within the applicable period of limitation. To so hold, considering the practicalities of litigation, is to effectively destroy the sanction of damages for violation of Section 8.

## II

Petitioners can secure the full relief which they seek only if their right to equality in seniority and status with non-veteran employees is held to last beyond the first year of reemployment. However, even were this right limited to a year, the court below erred in holding that this period ran before there had been compliance with the terms of the Act. The only basis for limiting petitioners' rights to one year is the provision prohibiting discharge "from such position without cause within one year after such restoration." (8(c)) "Such position" is the position the veteran left or one of "like

seniority, status or pay." (8(b)) "Restoration" is to be without loss of seniority and the veteran is to be "considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces" (8(c)). Where the veteran has never been restored to his proper position in accordance with these directions—and the petitioners in this case contend they have not—the restoration contemplated by the Act, which starts the running of the year, has never taken place. Therefore, there is no basis for considering the rights of the petitioners to be exhausted.

Petitioners have asked for restoration in accordance with the requirements of the Act; the record shows only that they have been given employment, which they assert to be inferior to that to which they are entitled under the Act. By accepting this employment while endeavoring to secure restoration in accordance with the terms of the statute, they cannot be deemed to have waived their rights to such restoration. *Troy v. Mohawk Shop, Inc.* (M. D. Pa.) 67 F. Supp. 721; *Freeman v. Gateway Bakery Co.*, (W. D. Ark.) 68 F. Supp. 383; *Radzicki v. Columbia Aircrafts Prod., Inc.*, (D. N. J., 12-10-46); *Covey v. Douglas Aircraft Co., Inc.* (S. D. Calif., 10-22-46); *Newman v. Hi-Hat Elkhorn Mining Co., Inc.*, (E. D. Ky., 9-4-46); *Laeuger v. Todd Pacific Shipyards, Inc.*, (W. D. Wash., 11-30-45).

The petitioner Haynes alleges that he has been given employment in a position carrying a lower

rate of pay than that to which he is entitled. If that is so, his employer is liable to him for the wages he has lost in consequence. Sec. 8(e). *Ander-son v. Schouweiler*, (Idaho) 63 F. Supp. 802; *Troy v. Mohawk Shop Inc.*, *supra*; *Freeman v. Gateway Baking Co.*, *supra*. His retention for a year in such lower paid employment can augment, but not extinguish that liability. Cf. *Feore v. North Shore Bus Co.*, 161 F. 2d 552 (C.A. 2).

The court below has held in effect that any employment for a year satisfies the requirements of the Act and extinguishes the employer's liability thereunder. Under any interpretation of the Act, nothing less than proof that the veteran has been restored to the position the Act requires and retained in that position for a year should bar the veteran from relief.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

FEBRUARY 1949.

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 28

JOHN WALTER OAKLEY, JR., PETITIONER

v.

LOUISVILLE & NASHVILLE RAILROAD CO.

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No. 29

JOHN S. HAYNES, PETITIONER

v.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC  
RAILWAY COMPANY<sup>1</sup>

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BRIEF FOR THE PETITIONERS

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## OPINIONS BELOW

The district court wrote no opinion in either case (OR. 18; HR. 15).<sup>2</sup> The opinion of the Court of Appeals for the Sixth Circuit in No. 28 (OR. 21), which was also the basis for its judgment in No. 29 (HR. 17), is reported at 170 F. 2d 1008.

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<sup>1</sup> The petition named Southern Railway System as respondent. By order of this Court, dated May 2, 1949, the name now appearing was substituted.

<sup>2</sup> References to the record in No. 28, the *Oakley* case, will be indicated by "OR", and in No. 29, the *Haynes* case, by "HR".

**JURISDICTION**

The judgments of the Court of Appeals were entered on November 22, 1948 (OR. 21; HR. 17). The petition for writs of certiorari was filed on February 19, 1949, and was granted on April 4, 1949 (OR. 23; HR. 18). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the restored veteran's right, under Section 8 of the Selective Training and Service Act of 1940, to have service in the armed forces counted as service in the plant, so that he is not penalized in his job by his service to the nation, terminates at the end of the veteran's first year of reemployment.

2. Whether the veteran's right to recover wages lost during the first year of reemployment, by reason of the employer's failure to restore him to the job to which he was entitled, is cut off by the expiration of the first year of reemployment.

3. Whether the veteran's right to at least one year of reemployment is satisfied by restoration to a job inferior to the one to which he was entitled.

**STATUTE INVOLVED**

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended by the Act of July 28, 1942, 56 Stat. 723, the Act of December 8, 1944, 58 Stat. 798, and the Act of June 29, 1946, 60 Stat. 341 (50 U. S. C. App. 308) provide as follows:

— (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. \* \* \*

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

\* \* \* \* \*

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

\* \* \* \* \*

(c) Any person who is restored to a position in accordance with the provisions of para-

graph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

\* \* \* \* \*

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions,

such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

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STATEMENT

These actions were brought in the United States District Court for the Eastern District of Kentucky under Section 8(e) of the Selective Training and Service Act of 1940. The plaintiffs were honorably discharged veterans who, having satisfied all the conditions prescribed by the Act, brought suit principally to gain restoration to the jobs to which they claimed to be entitled (OR. 1-3; HR. 1-3). The collective bargaining agents of the employees intervened in both cases and moved to dismiss the complaints on the ground that the questions involved had become moot because more than one year had elapsed since the veterans' restoration (OR. 13, 18; HR. 12, 14). The motions to dismiss as moot were granted before trial (OR. 18; HR. 15), and the orders of dismissal were affirmed by the court below (OR. 21; HR. 17).

In both cases, the complaints alleged that the veterans had been denied the jobs to which their sen-

iority would have entitled them had they remained at the plant and not gone into military service (OR. 2; HR. 2).<sup>3</sup> As a result of the veterans' absence in the armed forces, it was charged, employees remaining on the job, who otherwise would have had less seniority, were enjoying superior status (OR. 2; HR. 2). The complaints made clear that the veterans sought only the status that would have been theirs but for their military service; they sought no advantage over nonveteran employees beyond insisting that their time in the armed forces be counted as time on the job (OR. 2; HR. 2).

In No. 28, Oakley, prior to his induction in the armed forces on May 7, 1944, had been working as a locomotive machinist for the respondent railroad at Loyall, Kentucky (OR. 1). On July 1, 1945, the railroad's Loyall shop was transferred to Corbin, Kentucky (OR. 2). The collective bargaining agreement between the railroad and the intervening union provided that men furloughed at one point would receive preference in transfers to other points where men were needed with "seniority to govern" (OR. 6, 10). Had Oakley not been in the armed forces he would have transferred to the Corbin shop on July 1, 1945, and his seniority at Corbin would have commenced on that date (OR. 2). After his discharge and timely application for restoration, he was reemployed as a locomotive ma-

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<sup>3</sup> Since the cases were decided on motions to dismiss without trial, the factual allegations in the complaints must be taken as true for the purpose of this proceeding.

chinist at Corbin on July 17, 1946, with seniority from that date instead of July 1, 1945 (OR. 2). As a result of this reduced seniority, he was required to work the night shift rather than the day shift to which the earlier seniority date would have entitled him, and he was also subjected to the possible loss of his job entirely (OR. 2).

In No. 29, Haynes, prior to his enlistment in the armed forces on February 1, 1942, had been employed as a machinist helper and was reemployed as a machinist helper on his return in November, 1945 (HR. 1, 2). This position, however, was not the one he would have occupied on the basis of seniority had he remained in the service of the railroad (HR. 2). Between December, 1942, and February, 1943, while Haynes was in military service, six machinist helpers junior in seniority to him were promoted by virtue of their seniority to positions as helper apprentices at higher rates of pay (HR. 2, 6). Haynes was qualified and physically able to perform the duties of helper apprentice, and, on the basis of relative seniority, he would have been promoted no later than February, 1943, had he remained on the job (HR. 2). At the time of his reinstatement, therefore, he would have been a helper apprentice with seniority from the date of his promotion instead of a machinist helper—the job to which he was restored (HR. 2).

Both veterans prayed for decrees restoring them to the positions and to the seniority status they would have had but for their military service, and

for other appropriate relief (OR. 2; HR. 2-3). In the case of Haynes, there was also a specific prayer for the recovery of wages lost because of the railroad's failure to reinstate him as a helper apprentice with appropriate seniority upon his re-employment (HR. 2-3).

Before evidence had been taken in either case, the district court assigned for argument in No. 28 the question whether this Court's decision in *Trailmobile Co. v. Whirls*, 331 U. S. 40, required the proceeding to be held moot (OR. 18). Thereafter, the intervening unions filed formal motions of dismissal in both actions and the actions were dismissed as moot "because more than one year has elapsed since the date of the plaintiff's restoration to employment with the defendant" (OR. 18; HR. 14-15). The court below affirmed the dismissal in each case on the ground that, under this Court's decision in the *Trailmobile* case, *supra*, petitioner "was entitled to restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed" (OR. 23; HR. 17).

#### SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred:

1. In holding that the protection within the framework of the seniority system, given a veteran

by the Act, including the right to the same position in the employ of the employer whose employ he left in order to enter the armed forces as is enjoyed by nonveterans with the same or less seniority who remained behind, and which position he would have occupied but for his military service, terminates one year after his reemployment.

2. In holding that the acceptance for one year by a veteran of a position inferior to that to which he is entitled terminates his claim to the protection of the Act and even divests him of an accrued right to wages lost by reason of his employer's violation of that Act.

3. In holding that the decision of this Court in *Trailmobile Co. v. Whirls*, 331 U. S. 40, compelled dismissal of these actions.

4. In affirming the judgment of the district court dismissing these actions.

#### SUMMARY OF ARGUMENT

The dismissal of the veterans' complaints in these cases can only be read as a determination by the courts below that the right, under Section 8 of the Selective Service Act of 1940, to have time in the military service credited as time on the job, expires at the end of the first year's reemployment. The decisions below are supportable on no other ground at this stage of the litigation. And, so grounded, the judgments below are erroneous.

The courts below have sharply curtailed the rights of veterans through their complete misconception of the effect of this Court's decision in *Trailmobile Co. v. Whirls*, 331 U. S. 40, upon which sole reliance was placed. This Court's opinion in that case contains unambiguous language making the judgment there expressly inapplicable to the precise question here involved, namely, whether the veteran is protected against discriminatory treatment after a year's reemployment. That case decided that any preferred status which the statute may have given veterans over other employees did not survive a year; it did not decide that, after a year, a veteran could be denied equal treatment with nonveteran employees who would have had identical seniority but for the veteran's military service.

The words of the statute, its legislative history, and this Court's pertinent decisions all point inescapably to the conclusion, rejected below, that the statutory requirement of restoration "without loss of seniority" is one which continues in force beyond the first year of the veteran's reemployment. Section 8 of the Act provided dual benefits: A veteran "called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law

withheld from those who stayed behind." *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 284. It may be that the special advantage conferred does not survive the first year; it is certainly not true that the protection against being penalized is so limited. The sense of the Congress, expressed in Section 9 (c) (2) of the Selective Service Act of 1948 and declaratory of the rights conferred by the 1940 Act, was that a veteran be restored to his position "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." That is the status claimed in the complaints in these cases and denied by the courts below. And that "statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment." *Trailmobile Co. v. Whirls*, 331 U. S. 40, 58.

## II

In any event, the right of a veteran to be compensated under Section 8(e), on account of his employer's failure to restore him to the position to which he is entitled does not disappear with the end of his first year of reemployment. There is no justification whatever for denying compensation

for damages suffered during a period admittedly covered by the Act because the Act's protection might be refused for a subsequent period.

### III

Even if all Section 8 protection is terminated at the end of one year after a veteran's restoration, the judgments below are, nevertheless, erroneous. This limiting period, when applicable, cannot be deemed to have begun until the veteran has been restored to the position to which his seniority plus his military service credit entitles him. In these cases, the veterans have never been so restored.

#### ARGUMENT

The veterans here are asserting only their right under Section 8 of the Selective Training and Service Act of 1940 to be "restored without loss of seniority" to the jobs they left when they went into military service. They seek no advantage over those who worked alongside them at the time of their induction and no "preferred seniority standing" except to have their period of military service treated as time on the job so that their employment status will not be prejudiced by their service to the Nation. In this respect, the situation is quite different from that involved in *Trailmobile Co. v. Whirls*, 331 U. S. 40, where the restored veterans claimed a status which had been denied to all similarly situated employees, veteran and non-veteran employees alike.

The principal question for decision, therefore, is the duration of the right of veterans to receive credit within the framework of a seniority system for their period of military service and thus to maintain equality with nonveteran employees. Without examination into the rights conferred under the respective seniority systems involved to determine whether the veterans were seeking a special or merely an equal status, the court below held that the veterans were not entitled to a "preferred seniority standing" because a year had elapsed since their restoration. It is clear that what the court meant by "preferred seniority standing" was the right to receive credit for military service after a year. This is apparent not only from the fact that no analysis of the effects of the operation of the seniority system was made to compare the rights claimed by the veterans with those enjoyed by others, but also from the fact that both actions were disposed of on motions to dismiss, predicated solely on the fact that a year had elapsed since the veterans' restoration (OR. 18; HR. 14).

Both complaints alleged that the status sought would have been obtained solely on the basis of seniority if petitioners had remained on their jobs (OR. 2; HR. 2). Since these allegations must be taken as true for purposes of a motion to dismiss, there was no issue before the court below and there is none before this Court as to whether petitioners in fact would have been entitled to the positions they claimed by mere operation of the seniority system.

Determination of this question depends upon evidence not in the record because of the disposition of the suits before trial on motions to dismiss. The decision below, therefore, must be considered as a determination that the right under the Act to have military service credited for purposes of seniority expires at the end of the first year's reemployment, and the correctness of that decision is the main issue in this proceeding.<sup>4</sup> Two subordinate issues are also raised by the dismissal of the veterans' complaints. These are (1) whether the right to recover monetary losses suffered during the first year of reemployment as a result of improper restoration dies at the end of the year, and (2) whether reemployment at any job for a year terminates the veteran's claim to protection of the Act. None of these issues was involved in the *Trailmobile* case; consequently the summary dismissal of the complaint solely on the authority of that decision is insupportable.

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<sup>4</sup> Although a request for admissions (OR. 4), a response to this request (OR. 10), and a motion for summary judgment (OR. 12), were filed in No. 28, it is apparent that they had no bearing on the decision in the case because no such procedural steps occurred in No. 29 in which the court relied for its judgment upon its decision in No. 28 (HR. 17).

**The Right of Veterans to Receive Seniority Credit for Their Period of Military Service as Protection Against Discriminatory Treatment Is Secured for More Than One Year from the Date of Restoration**

In both cases we start with the proposition that the veterans were denied positions to which their seniority alone would have entitled them had they remained on the job and not gone into military service. This denial was apparently based on the theory that the statutory protection requiring the period of military service to be counted as time on the job expired after the year's reemployment which the veterans had already enjoyed. The effect of the holding, therefore, is that, at the end of a year, time spent in military service may be subtracted from the restored veterans' job service and their seniority accordingly reduced. Thus, the decision below is open to question not because it denies the restored veterans any preferred status over nonveteran employees, but because it actually places them in an inferior position. They have been discriminated against so that as a result of their service to the nation they have been permanently prejudiced in their job status and non-veteran employees have gained a permanent advantage over them. As previously indicated, the court below reached this result on the theory that it was required by *Trailmobile Co. v. Whirls*, 331 U.S. 40, which it construed as limiting the veterans' right to restoration without loss of seniority to a single year.

This ruling completely misconstrues this Court's decision in *Trailmobile* and misinterprets the effect of the statute. The court below regarded as decided in *Trailmobile* the question upon which decision was expressly reserved. In that case the veteran's claim was that Section 8 protected him, more than a year after his restoration, from a reduction in seniority suffered by all employees of the company for which he had worked, veteran and nonveteran alike, upon the consolidation of that company with another. The Court decided that any preferred status which the statute may have given veterans over other employees did not survive a year. The Court refused to decide whether after a year veterans were assured equal treatment with nonveteran employees who would have had identical seniority but for the veterans' military service. The Court, in the *Trailmobile* case, specifically held that it was "not required to determine the further question whether the statute would give protection to a reemployed veteran after the statutory year" in the event of discriminatory treatment in comparison with a nonveteran, found it unnecessary to pass upon whether "all protection afforded by virtue of § 8(c) terminates with the ending of the specified year," and expressly reserved "decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker." 331 U. S. at 60. Although the Court did

not have before it the question of the duration of the veteran's right to equal treatment by crediting military service as service in the plant, the decision points out that "It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment" (p. 58). The reliance of the court below upon the *Trailmobile* decision for its holding is, therefore, an obvious misconception of the holding of that case.

Neither the statutory language nor its purpose permits the untoward result reached by the court below. Its interpretation of the statute, moreover, is in conflict with the basic legislative objective reiterated in the opinions of this Court.

A: *Section 8 does not limit the right of restoration "without loss of seniority" to one year.*—The pertinent portions of Section 8 (*supra*, pp. 3-4) provide that the veteran shall be restored—

\* \* \* to a position of like seniority, status,  
and pay \* \* \*

and that a veteran restored to a position in private industry—

\* \* \* shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer

at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

This language does not support the construction that the requirement of restoration "without loss of seniority" is limited to one year's duration. The very nature of the benefits provided precludes a construction in the absence of unambiguous language requiring it, which confines them to so short a period. The same section that requires veterans to be restored "without loss of seniority" also extends comparable protection to their pension and retirement rights by the clause relating to "insurance or other benefits offered by the employer pursuant to established rules and practices." According to Senator Sheppard, Chairman of the Senate Military Affairs Committee which drafted the legislation, Section 8(c) was intended "to prevent loss of seniority, accrued employment benefits, including participation in insurance, pension, bonus, and other beneficial programs." 86 Cong. Rec. 10095. And Representative May, Chairman of the House Military Affairs Committee, explained, with particular reference to railroad employees, that (86 Cong. Rec. 11702)—

\* \* \* we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Clearly, men young enough to be drafted for a year's service would not be eligible for pensions or

retirement within a year after their restoration nor, in fact, until many years after their return to employment. Nothing could more emphatically negate an intention to limit the statutory protection for pension and retirement rights to a year of employment. And the structure of Section 8(c) furnishes no basis for drawing a distinction in this respect between seniority rights and other benefits.

The sole provision limiting protection to a year is the guarantee that the veteran "shall not be discharged from such position without cause within one year after such restoration." But it would seem to be a gross distortion of the ordinary meaning of words to interpret a prohibition against discharge as creating a restriction upon the duration of other rights which contain no time limitation. To the extent that the prohibition against discharge for a year may enhance other incidents of the restored veteran's position by preventing even their non-discriminatory adverse modification, it is effective for only a year. See *Trailmobile Co. v. Whirls*, *supra*. The time limit of a year, however, is not thereby imposed upon those aspects of the benefits which are not enlarged by the prohibition against discharge. Thus, the veteran's right to be restored to his job without loss of seniority assures him that he will be treated the same as similarly situated employees who remained on the job. The prohibition against discharge, however, may possibly provide the additional benefit of preventing adverse modification

of his seniority rights for a year notwithstanding such modification of the rights of nonveteran employees.<sup>5</sup> Only the latter protection expires after a year because it flows from the prohibition against discharge. The protection unrelated to the discharge prohibition, however, extends beyond the year because there is no statutory time restriction.

The dual nature of the benefits provided by the Act has been recognized by this Court in both *Fishgold v. Sullivan Corp.*, 328 U.S. 275, and *Trailmobile Co. v. Whirls*, *supra*. The *Fishgold* opinion points out that (p. 284)—

The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

The protection against being penalized is contained in the provisions having no period of limitation. The advantage "withheld from those who stayed behind" is provided by the prohibition against dis-

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<sup>5</sup> "For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy. But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress." (331 U.S. at 58-59.)

charge for one year. The interpretation of the prohibition against discharge as conferring an additional benefit rather than as circumscribing those previously provided is confirmed by the Court's further statement that what Congress "undertook to do was to give the veteran protection within the framework of the seniority system *plus a guarantee against demotion or termination of the employment relationship without cause for a year*"\* (p. 288). The *Trailmobile* opinion similarly acknowledges two types of benefits. It held that the "preferred status" provided by "the extraordinary statutory security" against adverse alteration of restored rights extended for only a year (331 U. S. at 59). But with respect to being "disadvantaged by his service to the nation," it made clear "that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment" (p. 58).

The guarantee against discharge for a year has the further purpose of providing a minimum of tenure in those industries where the employees' status does not have the protection of a collective bargaining agreement. In organized industries "the union would normally afford its members protection against termination of their employment status without cause." *Fishgold v. Sullivan Corp.*, 328 U. S. at 288. In other situations, however, where the terms of the employment status do not include seniority or other rights, the one-year guaran-

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\* Italics throughout the brief are supplied.

tee may be the only protection available to the returning veteran against arbitrary dismissal after formal compliance with the Act's restoration requirements. It is apparent, therefore, that the one-year guarantee against discharge has its own separate scope and does not operate to shorten the life of other benefits which are conferred without time restrictions.

It also appears that Congress considered virtually identical language in the 1948 Act with respect to a guarantee against discharge for a year as providing protection *in addition* to the other benefits. With respect to the paragraph of the Selective Service Act of 1948 (Public Law 759, 80th Cong.) which "reenacts section 8(c) of the 1940 act," the Senate Report states that "It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service, such as accumulated seniority rights and insurance benefits. *In addition*," the explanation continues, "the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration." S. Rep. 1268, 80th Cong., 2d sess., p. 16. Thus, it would seem to follow, that the time limitation would be co-extensive with the additional benefits. See *supra*, pp. 19-20.

*B. Congress intended to preclude penalties from attaching to a veteran on account of his service to the nation.*—The legislative material is rich with evidence of the Congressional purpose to restore

the returning veteran without disadvantage because of his military service. Equality of position without loss of seniority as compared with non-veteran employees was viewed as having substantial importance to the veteran. Had Congress contemplated withdrawal of his right to equality after a year, that limitation could hardly have escaped mention, let alone debate. But not a word even suggesting that possibility is to be found in the legislative record. The thought that his employer was free to penalize him because of his military service at the expiration of a year cannot, therefore, be harmonized with the consistent pattern of legislative action and expression.

The Congressional concern for preserving the status of veterans was evidenced early in connection with the provisions concerning reemployment without loss of seniority which first appeared in the successive prints in the Senate Committee on Military Affairs of S. 4164, which, together with H. R. 10132, eventually became the Selective Training and Service Act of 1940. See Committee Print No. 1, July 23, 1940; Committee Print No. 4, July 27, 1940; Committee Print No. 5, July 31, 1940. These reemployment provisions were incorporated in S. J. Res. 286, the parallel bill which eventually became the National Guard Act and were first debated in Congress in connection with that bill.<sup>7</sup> See

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<sup>7</sup> In tracing the development of Section 8 of the Selective Training and Service Act, reference will be made to the legislative history of both that Act and the National Guard Act, since both were simultaneously under consideration, and because a deliberate attempt was made to keep their reemploy-

S. Rep. No. 1987, 76th Cong., 3d sess. Various language changes in conference to reconcile the House and Senate versions of the bill, were explained by the Chairman of the House Military Affairs Committee as follows (86 Cong. Rec. 10761):

\*\*\* You will find that in amendments numbered 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

S. J. Res. 286 was passed by both Houses with these changes (86 Cong. Rec. 10759-10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858).

The purpose to count time in the service as time on the job was emphasized when these reemployment provisions were carried over into the selective service bill (86 Cong. Rec. 10922-10923) with a further amendment elaborating paragraph (c) to its present form. 86 Cong. Rec. 10914, 11702. The changed paragraph with the italicized portions in-

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ment provisions identical? Changes made in one were incorporated into the other without further debate.

dicating the added and amended language, read as follows:

Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered during the the period of service in such forces as on furlough or leave of absence; and shall be so restored without loss of seniority; and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces; and shall not be discharged from such position without cause within 1 year after such restoration.*<sup>8</sup>

The chief purpose of this amendment, according to Chairman May, was (86 Cong. Rec. 11702)—

to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service *and they will even be permitted to count this time on the question of their retirement.*

Throughout the Congressional consideration of the reemployment provisions, both in the National

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<sup>8</sup> This change was then made in the appropriate section of the National Guard Act, previously passed, so as to conform the two statutes. See Section 8(d) of the original Selective Training and Service Act, 54 Stat. at 891, amending Section 3(c) of the National Guard Act.

Guard and the selective service bills, the right of restoration to a job without loss of seniority was frequently emphasized and its limitation to one year was never suggested. Senator Sheppard, Chairman of the Senate Military Affairs Committee, described Section 8 as an attempt "to prevent loss of seniority, accrued employment benefits \* \* \* and other beneficial programs" (86 Cong. Rec. 10095), and the identical provision in the National Guard Act as an effort to insure that returning veterans be restored "to their former employment at the end of their training or to employment of similar pay and status." He further explained that "Persons restored to \* \* \* positions in private employment shall be so restored without loss of seniority, insurance participation, or other benefits, and such persons shall not be discharged from such positions without cause within 1 year after such restoration." (86 Cong. Rec. 9836.) Senator Thomas, another member of the Senate Military Affairs Committee, referred to Section 8 as an attempt " \* \* \* to make secure [the veterans'] seniority, and to make secure all of the relations they had gained as a result of working." (86 Cong. Rec. 10572.) Representative Celler considered Section 8 as a direction to private employers to restore the returning veteran "to [his original] position, or to a position of like seniority, status, and pay \* \* \*", and that under these provisions, "All those who serve shall have the right to claim return to their jobs." 86 Cong. Rec. 11435. Rep-

representative Healey stated that "You have held out to these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their *status quo* before they were inducted into the service" (86 Cong. Rec. 11703). This emphasis upon restoring veterans to their jobs without prejudice to their status, in the absence of any time qualifications, appears to rule out the conclusion that penalties in job status, solely because of military service, could be imposed at the end of a year.

The 1946 reenactment of the Act (60 Stat. 341, 342), continuing Section 8 indefinitely, also evidences the Congressional intention to have seniority protection survive a year. The enactment was intended to make the section "permanent law" (Statement of Managers on the part of the House of Representatives, 92 Cong. Rec. 7472) and "perpetual" (statement of Chairman May, 92 Cong. Rec. 3588). Chairman May stated: "Section 8 of the act is the one that guarantees a man priority or seniority rights to a job, or to his old job when he returns from the service and we have maintained that provision and made it perpetual so long as the act is in effect." It is unlikely that Congress would have thought it necessary to enact Section 8 into permanent law, if all veteran's reemployment rights expired within a year after initial reinstatement.

There is a further suggestion that the rights under the 1940 act were thought to be continuing

rights in the explanation of the Senate Committee on Armed Services that no important substantive changes with respect to reemployment were made in the 1948 act because of the policy that "no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." **S.** Rep. 1268, 80th Cong., 2d sess., p. 15. Veterans who were back on their jobs when the 1948 act was passed would ordinarily have completed their first year of reemployment by the time a trainee had completed the twenty-one-month service period under the 1948 act. See Selective Service Act of 1948, Section 4(b).

Additional corroboration for the interpretation that seniority protection was not limited to a year is furnished by Congress' own construction of language virtually the same as that under consideration here. Section 9(c)(2) of the Selective Service Act of 1948, referring to language identical with that contained in Section 8(b) of the 1940 Act except for additions not relevant here, provides:

It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his en-

tering the armed forces until the time of his restoration to such employment.

It should be noted that this paragraph does not purport to create additional benefits but merely to state the effect of the provisions referred to. The Senate Report refers to this provision as a "Statement of policy regarding application of the 'escalator principle'" (p. 16). The so-called "escalator principle" is obviously a reference to the principle announced by this Court in the *Fishgold* case which dealt with the very provisions involved in this case. There is no suggestion in the language employed that the status to which the veteran was to be restored was to last for only a year, nor that the time in military service was to be subtracted at the end of a year. The pains Congress took to explain its intention indicate that the one year limitation would have been included in the explanation if such a limitation had been intended. See, also, S. Rep. No. 1268, 80th Cong., 2d sess. (1948), p. 16.

*C. This Court has made it clear that the right to have the period of military service treated as time on the job is not limited to one year.—The "sense of the Congress" incorporated in the Selective Service Act of 1948 in effect ratifies this Court's previous interpretation of Section 8, which accords with the prior legislative history. The note that the restored veteran is to suffer no loss in job status by his military service is consistently sounded. This assurance and the language used to express it seem completely incompatible with the*

view that the protection extended is extremely short-lived. In *Fishgold v. Sullivan Corp., supra*, it was explained that the restored veteran "was not to be penalized on his return by reason of his absence from his civilian job" and that "he does not step back on the seniority escalator at the point he stepped off" (p. 284). Rather, "he steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285). The provisions of Section 8 were deemed to "guarantee the veteran against loss of position or loss of seniority by reason of his absence" and "his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285). Thus "Congress made the restoration as nearly a complete substitute for the original job as was possible" and "protected the veteran against loss of ground or demotion on his return" (p. 286). The position to which the veteran was entitled to be restored was "the 'position' which he left plus cumulated seniority" (p. 287). The Act recognized "the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence" (p. 288). The appraisal of the statutory purposes in these unconditional terms can hardly be squared with the holding of the court below that there was a one year condition on the enjoyment of the Act's benefits.

Similar views as to the effect of Section 8 were expressed in *Trailmobile Co. v. Whirls*, *supra*. The *Fishgold* case was described as holding "that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41) so that his "standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (p. 56). Men were said to have been inducted for a year's training "with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58). The holding that the restored veteran "could not be disadvantaged by his service to the nation" nor penalized by reason of his absence was reiterated (p. 58). In *Aeronautical Lodge v. Campbell*, 337 U. S. 521, the Court's opinion again observed that "under the Act the veteran accumulates time toward his seniority while in the service" and has "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force" so that he is protected "from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough'" (pp. 525-526). The restored veteran's rights were held to be determined by the collective agreement "inasmuch as that agreement in no wise disad-

vantaged his position because he was in the military service" (p. 528). And, most significantly here, the duration of the right to receive seniority credit for military service was clearly indicated when this Court stated in *Trailmobile* "that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of the first year of reemployment" (p. 58).

In the *Fishgold*, *Trailmobile*, and *Campbell* cases, the restored veterans sought preferred status over nonveteran employees. In the instant case, however, neither veteran has at any time sought any form of superseniority. Rather, each alleges that he was reemployed in a position which was inferior to the one he would have had if he had remained on the job instead of serving in the armed forces. Oakley, who was reemployed as a locomotive machinist at Corbin, with seniority as of the date of his reemployment, contends that he is entitled to seniority as of July 1, 1945, the date during his absence on which he would have been transferred to Corbin. He asserts that the result of this loss of seniority has been to relegate him to night work and, more important, to put him in a more vulnerable position with respect to layoffs. Haynes, who was reemployed as a machinist helper, alleges that had he remained on the job he would have been promoted to helper apprentice with higher pay, as were six nonveterans who had less than his seniority at the time he entered the armed forces.

The decisions below thus go far beyond the *Fishgold*, *Trailmobile* and *Campbell* cases in holding that the veteran's right to equality of treatment and the protection of his position on the seniority escalator endure for only the first year of reemployment.<sup>9</sup> The obvious and direct result is to make Section 8(c) a dead letter for most veterans of World War II.

In such highly organized industries as the railroad industry, seniority rights determine almost every aspect of employment, including promotions, retirement, pension rights, lay-offs, discharges and transfers. If, after the expiration of the statutory year, the veteran has no protection against a refusal to credit the time spent by him in the service toward such rights, he has been permanently and most seriously "penalized on his return by reason of his absence from his civilian job" contrary to the clearly expressed Congressional design as recog-

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<sup>9</sup> For reasons already stated the Court does not have before it the question whether the veterans would in fact be entitled under the terms of the applicable collective bargaining agreement to the status they assert. Since both cases were decided on motions to dismiss the complaints, it would seem inappropriate at this time to attempt to appraise the effect of the collective bargaining agreements without the benefit of evidence relating to the interpretations of the parties, the actual practices under them, and other relevant considerations. In any event, however, it would seem that any contractual requirement that a veteran be actually on the job in order to receive seniority credit or obtain a seniority benefit would be inoperative as inconsistent with the plain mandate of the statute that military service must be treated as the equivalent of time on the job. Any further requirement, as a condition to the enjoyment of an automatic seniority benefit, that a form be executed, which as a practical matter necessitates the veteran's presence, runs into the same statutory objection.

nized by this Court. The result is also inconsistent with this Court's construction that the time spent in military service must be counted as time on the job in computing seniority—a construction which Congress has expressly ratified. We think it clear that Section 8(c) protects the veteran's rights within the framework of a seniority system beyond a year and that this protection extends to the inclusion of service-acquired seniority in the computations of seniority. While a veteran's seniority rights may be modified after the first year of reemployment by arrangements which do not discriminate against him, the statutory assurance that his military service will be counted protects him against discriminatory treatment effected through discounting his military service. See *Spearmon v. Thompson*, 173 F. 2d 452 (C.A. 8); *Morris v. Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7); *Rudisill v. Chesapeake & Ohio Ry. Co.*, 167 F. 2d 175 (C.A. 4); *Mentzel v. Diamond*, 167 F. 2d 299 (C.A. 3); *Connor v. Pennsylvania Railroad*, decided August 1, 1949, (C.A.D.C.).

## II

### **The Right to Recover Back Pay Is Not Defeated by the Expiration of One Year from the Date of Restoration**

In addition to its erroneous denial of statutory protection beyond a year, the decision of the court below also incorrectly deprived Haynes of rights which vested during his first year of reemployment. The railroad's failure to restore Haynes as a helper

apprentice in accordance with his seniority resulted in his receiving a lower rate of pay during the first year of his reemployment (HR. 2). His complaint specifically prayed for recovery of "the increase in wages which he would have been entitled to receive" had he been reemployed as a helper apprentice (HR. 2-3).<sup>10</sup> Section 8(e) of the Act explicitly contemplates compensation for loss of wages as an incident to other remedies under the Act. The effect of the decision below is to rule that, although Haynes may have been entitled to be reemployed as a helper apprentice for one year, he cannot recover monetary damages after the year for the railroad's failure to so reemploy him during the year.<sup>11</sup> Certainly there is nothing in the *Trail-mobile* opinion, the sole authority for the lower

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<sup>10</sup> The respondent in No. 29 charges that Haynes was guilty of laches. Br. in Opp. But that question is not open in this Court on the present record since, as has already been noted, *supra*, pp. 13-14, the case was disposed of on a motion to dismiss before trial. The question of laches is one of fact upon which there has been no trial.

<sup>11</sup> Although this question is not expressly dealt with by either the court below or the district court, it is clear that the dismissal of the complaint by the district court and the affirmance of this dismissal by the court below effectively dispose of Haynes' right to recover back pay. On the appeal below, the attention of the parties and the court were directed at the district court ruling apparently denying all Section 8 rights. In that posture of the case, the specific right to back pay was comprehended within the broader contentions advanced by the veteran and rejected below. But since both courts of necessity ruled upon the validity of the complaint which specifically requests the award of back compensation, and since the record contains no waiver of this claim, the question of the right to recover underpayments for the first year of reemployment seems properly presented by the record in No. 29.

court's decision, to support this result, and it cannot be upheld on the basis of policy or reason. Even assuming with the court below—that a veteran's rights endure for only the first year of reemployment, it does not follow that the cause of action for the amount of the veteran's financial loss resulting from violation of those rights must be determined within that year. To so hold, considering the practicalities of litigation, effectively destroys the sanction of damages for violation of Section 8. Although the question has never been passed upon by this Court, many lower courts have recognized the existence of authority to award monetary damages after the expiration of the statutory year and where no question of reinstatement was involved. *Feore v. North Shore Bus Co.*, 161 F. 2d 552 (C.A. 2); *Bochterle v. Albert Robbins, Inc.*, 165 F. 2d 942 (C.A. 3); *Williams v. Dodds*, 163 F. 2d 724 (C.A. 9); *Heller v. Inter-Boro Savings & Loan Ass'n*, 166 F. 2d 83 (C.A. 3); *Loeb v. Kivo*, 169 F. 2d 346 (C.A. 2); *Houghton v. Texas State Life Insurance Co.*, 166 F. 2d 848 (C.A. 5); *Special Service Co., Inc. v. Delaney*, 172 F. 2d 16 (C.A. 5); *Mentzel v. Diamond*, 167 F. 2d 299 (C.A. 3); *Rudisill v. Chesapeake & Ohio Ry. Co.*, 167 F. 2d 175 (C.A. 4); *Foor v. Torrington Co.*, 170 F. 2d 487 (C.A. 7); *MacLaughlin v. Union Switch & Signal Co.*, 166 F. 2d 46 (C.A. 3); cf. *Spearmon v. Thompson*, 173 F. 2d 452 (C.A. 8). It is difficult to find justification for denying compensation for damages suffered during a period admittedly covered by

the Act because the Act's protection might be refused for a subsequent period.

### III.

**The One Year Limitation on Section 8 Rights, Even When Applicable, Does Not Start Running Until a Veteran Has Been Properly Restored**

Even if it should be decided that all protection ends one year after a veteran's restoration, we submit that this year should not be deemed to have begun until the veteran has been restored to the job to which his seniority plus his military service credit entitles him. The complaints in the instant proceeding should not have been dismissed therefore, because in both cases the veterans were restored to positions inferior to the ones to which their seniority entitled them.

Oakley was assigned to a more burdensome shift and was more vulnerable to layoff and discharge. Haynes was assigned to a lower grade of work at a lower rate of pay. These were the allegations of their complaints which must be taken as true for the purpose of this proceeding. Since the complaints were dismissed, the decision below must be construed as holding that even if veterans have not been restored to proper positions, their statutory protection nevertheless expires if they have been reemployed for a year in any position. The *Trailmobile* decision clearly is no authority for this holding. In that case, the veteran had been properly restored for a year and the only question was

the duration of certain benefits beyond a year. The Court was not confronted with, and did not pass upon, the problem of the effect of restoration to an inferior position for a year. Thus even if all statutory rights expire at the end of a year's reemployment, *Trailmobile* does not support the view that the year's protection may be terminated by restoration to an inferior position.

Moreover, the statutory language precludes the holding that the period of protection expires before there has been compliance with the terms of the Act. The only possible basis for limiting veterans' rights to one year is the provision in Section 8(c) prohibiting discharge "from such position without cause within one year after such restoration." "Such position" is the position the veteran left or one of "like seniority, status, and pay" (8(b)). "Restoration" is to be without loss of seniority (8(c)). Where the veteran has never been restored to his proper position in accordance with these directions, the restoration contemplated by the Act, which starts the running of the year, has never taken place. Therefore, there is no basis for considering the rights to be exhausted.

Petitioners have asked for restoration in accordance with the requirements of the Act; the record shows only that they have been given employment inferior to that to which they are entitled under the Act. By accepting this employment while endeavoring to secure restoration in accordance with the terms of the statute, they cannot be deemed to

have waived their rights to such restoration. *Loeb v. Kivo*, 169 F. 2d 346 (C.A. 2); *Troy v. Mohawk Shop, Inc.*, 67 F. Supp. 721 (M.D. Pa.); *Freeman v. Gateway Bakery Co.*, 68 F. Supp. 383; (W.D. Ark.) *Radzicki v. Columbia Aircraft Prod., Inc.*, (D.N.J., 12-10-46); *Covey v. Douglas Aircraft Co., Inc.*, (S.D. Calif., 10-22-46); *Newman v. Hi-Hat Elkhorn Mining Co., Inc.* (E.D. Ky., 9-4-46); *Laeuger v. Todd Pacific Shipyards, Inc.* (W.D. Wash., 11-30-45); *Blankenship v. Newcastle Coal Co.* (N.D. Ala., 10-11-46). Under any interpretation of the duration of the Act's protection, nothing less than proof that the veteran has been restored to the position the Act requires and retained in that position for a year should bar the veteran from relief.

## CONCLUSION

The restrictive holding of the court of appeals with respect to the duration of restored seniority rights is based upon a complete misconception of this Court's decision in *Trailmobile Co. v. Whirls, supra*. This Court was not there concerned with the basic problem presented here and specifically reserved decision with respect to it. The statutory language, the legislative history, and the previously expressed views of this Court with respect to the nature of the protection provided require reversal of the judgments below.

Respectfully submitted,

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SEPTEMBER, 1949.

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IN THE  
**Supreme Court of the United States**  
October Term, 1949: 1747

**JOHN WALTER OAKLEY, JR.,**

Petitioner,

versus

**LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY,**

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO PETI-  
TION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

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IN THE  
**Supreme Court of the United States**

October Term, 1948.

No. 578.

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JOHN WALTER OAKLEY, JR., - - - *Petitioner,*

*v.*

LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY, - - - - - *Respondent.*

---

**BRIEF OF RESPONDENT IN OPPOSITION TO PETI-  
TION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

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**OPINION BELOW.**

The opinion of the District Court is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (OR. 28-31) is reported in 170 F. 2d 1008.

**COUNTER-QUESTION PRESENTED.**

The only substantive question presented is whether or not petitioner's seniority at Corbin should date from July 1, 1945, or from July 18, 1946.

**STATEMENT.**

When petitioner, Oakley, entered military service he was employed by respondent as a machinist at Loyall, Ky. (OR. 5), and, under the bargaining agreement covering his employment with respondent, his seniority was confined to that point. His seniority dated from the time he started to work at that point (OR. 8). While on furlough in the military service, there was a force reduction at Loyall which resulted in machinists with more seniority than petitioner being laid off and placed on furlough (OR. 5). Had petitioner not been in the military service on July 1, 1945, he would have been laid off at that time (OR. 6). When he returned from military service in 1946, petitioner was restored to the position he left plus cumulated seniority at Loyall, but there had been such a change in the circumstances that it was impossible to give him actual employment at Loyall (OR. 6). To have given him employment at Loyall would have been unreasonable and would have given him a preference over machinists senior to him (OR. 5). Petitioner recognized that fact and applied "for a job as machinist at Corbin" in accordance with the "bargaining agreement" (OR. 5-6). That agreement provided that men laid off in force reduction could, if they so

desired, apply for transfer, and be transferred to any point where men were needed, with the privilege of returning to the home station when force is increased (OR. 7-8). In applying for the transfer to Corbin, petitioner asked respondent to grant to him seniority dating at Corbin as of July 1, 1945, on the ground that had he not been in military service he would have accepted employment at Corbin at that time. Under the bargaining agreement, seniority is confined to the point employed and dates from the time the employee starts to work at that point (OR. 8). Petitioner was transferred to Corbin and began working at that point the day the application for transfer was received by respondent (OR. 6).

The only question presented by petitioner's complaint filed in the District Court was whether or not petitioner's seniority at Corbin should date from July 1, 1945, the day he could have applied for transfer to that point had he not been in the military service, or date from July 18, 1946, the first day he worked at Corbin after applying for transfer. Petitioner now ignores that issue and presents to this Court questions which are not germane to the question of petitioner's seniority rights, the only substantive question at issue.

The facts in this case are quite simple and are not in dispute. Respondent, at the time it served its answer, also served its request for admissions (OR. 5-9). All of its requests were admitted except those denied because of insufficient knowledge, and the admissions thus denied were proved by affidavit (OR. 16) filed with respondent's motion for summary judgment (OR.

15) almost four months before the action was dismissed by the District Court.

The record clearly shows that petitioner was asking for a seniority standing at Corbin not accorded to non-veterans, and that he bases his claim to that super-seniority, or preferred standing, on the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended (50 U.S.C. Appendix 308).

The District Court found that more than one year had elapsed since the date of petitioner's restoration of employment and dismissed the action as moot (OR. 24). The Court of Appeals affirmed the District Court on the ground that the statutory period of one year had elapsed; that under the provisions of the Selective Training and Service Act of 1940 petitioner was not, after that period, entitled to the preferred standing or super-seniority he claimed (OR. 30).

### **SUMMARY OF ARGUMENT.**

Respondent opposes this petition on the following grounds:

I. Petitioner was fully restored to his former position plus cumulated seniority; was not entitled to the seniority at Corbin claimed by him, and, the judgment of the District Court being correct, the petition should be denied.

II. Petitioner's claim to seniority at Corbin of a prior date to the day he first worked at that point, is a claim to super-seniority or preferred standing over

non-veterans, and any possible right to such super-seniority or preferred standing terminated with the expiration of the one-year statutory period.

### **ARGUMENT.**

- I. Petitioner Was Fully Restored to His Former Position Plus Cumulated Seniority; Was Not Entitled to the Seniority at Corbin Claimed by Him, and, the Judgment of the District Court Being Correct, the Petition Should be Denied.**

It is not denied that petitioner was restored to his old "position" or seniority at Loyall (OR. 6, 16). That restoration gave him the seniority he had before entering military service, plus the seniority he accumulated while in military service. He first began working at Loyall on July 6, 1943. He entered military service May 7, 1944. Upon his return he was given seniority at Loyall from July 6, 1943, the same seniority dating he had at the time he entered military service. It is admitted that during his absence there had been such a change in circumstances that it was impossible to give him work at Loyall, and that to give him work at Loyall would have been unreasonable and would have given him a preference over senior machinists (OR. 5, 6). Under the admitted facts he was not entitled to work at Loyall as long as senior machinists were laid off at that point. Under the Selective Training and Service Act of 1940, he was entitled to his old seniority at Loyall plus cumulated seniority, and that is exactly what was given him. He was, and still is, entitled to

be recalled to work at Loyall in accordance with that seniority. In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 287, 66 S. Ct. 1105, this Court had before it that question and said:

"The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his 'position' when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old 'position' or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's 'circumstances have so changed as to make it impossible or unreasonable' to restore him. §8(b) (B). He is entitled to be recalled to work in accordance with his seniority. His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework

of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The status of petitioner when he returned from military service was that of a machinist laid off at Loyall because of a reduction in forces, plus cumulative seniority at that point. He was therefore given full "protection within the framework of the seniority system" in effect upon respondent's railroad. In addition to the rights given petitioner under the Selective Training & Service Act, the bargaining agreement under which he works gave him certain privileges of transfer. Rule 26 (OR. 7, 8) of that agreement reads:

**"Rule 26—Transfer of Laid-Off Employees.**

"26(a) While forces are reduced, if men are needed at other points, furloughed men will be given preference to transfer, with privilege of returning to home station when force is increased,  
\* \* \* seniority to govern.

"26(b) An employee laid off in force reduction desiring to secure employment under this rule shall notify his foreman in writing and furnish his craft General Chairman copy of the letter."

Neither the lay-off at Loyall nor the bargaining agreement gave petitioner an automatic transfer to Corbin or to any other point. Under the bargaining agreement, petitioner was required to apply in writing for the transfer to Corbin and there must have been need for men at that point before the transfer would be made. It was under the provisions of Rule 26 that

petitioner applied for transfer to Corbin. His application so states (OR. 5-6). It was under this Rule that his request was granted, and petitioner at this time retains his old position, or seniority, at Loyall.

Upon his transfer to Corbin his seniority at that point was controlled by Rule 28 of the bargaining agreement, the pertinent part of which is as follows:

“28(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.

“28(b) Seniority of employes in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:

“Machinists \* \* \*”

(OR. 8. Under that Rule it is clear that petitioner's seniority at Corbin dated from July 18, 1946, the day he first worked at that point after being transferred. To establish seniority at Corbin petitioner had to begin working at Corbin. The Selective Training and Service Act of 1940 did not create a new seniority for petitioner, it simply protected what seniority he had, plus that which he accumulated while in military service. It gave him no step-up or gain in priority. The non-veterans who were cut off on July 1, 1945, because of the force reduction at Loyall, did not apply for transfer to Corbin (OR. 5, 7). Had they made such application their seniority at Corbin would have begun on the day they first worked at that point after the transfer. The seniority given to petitioner at Corbin began

on the day he first worked there, as provided by Rule 28, *supra*.

In Fishgold's case, *supra*, this Court said:

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

The admitted facts which the District Court had before it when the action was dismissed, show clearly that petitioner was fully restored to his old position without loss of seniority upon his discharge from the armed services. He was given all of the rights to which he was entitled under both the Selective Training and Service Act and the Bargaining Agreement. He was not entitled to more.

Under the facts shown by admissions and affidavit, the judgment of the District Court is correct and should be affirmed, regardless of the ground upon

which the Court relied. As was said in *Helvering v. Gowran*, 302 U. S. 238, 245, 58 S. Ct. 154:

"In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

**II. Petitioner's Claim to Seniority at Corbin of a Prior Date to the Day He First Worked at That Point Is a Claim to Super-Seniority or Preferred Standing Over Non-Veterans, and Any Possible Right to Such Super-Seniority or Preferred Standing Terminated With the Expiration of the One Year Statutory Period.**

In *Trailmobile Co. v. Whirls*, 331 U. S. 40, 67 S. Ct. 982, this Court had before it the question of the "duration of the veteran's restored seniority standing" and said:

"We find it unnecessary therefore to pass upon petitioners' position in this case, namely, that all protection afforded by virtue of §8(c) terminates with the ending of the specified year. *We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.*" (Emphasis supplied.)

Non-veterans who are cut off by reduction in forces are only entitled to seniority at the point to which they transfer from the day they begin working at that point. It is apparent that if petitioner is given a seniority dating at Corbin as of July 1, 1945, long

before he began working at that point, and that if the seniority of non-veterans at that point dates from the day they first began working there, then petitioner would be given a super-seniority or preferred standing over employees who are not veterans. That is exactly what he requested when he made application for transfer and which he now claims. It is also exactly what this Court said in the *Whirls* case he was not entitled to. To emphasize this point we again quote from the opinion in that case:

"But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress."

When petitioner entered military service his seniority was confined to Loyall. He had no fixed or absolute right to transfer to Corbin, or to seniority at Corbin. His transfer there depended upon his making application for transfer, and there being a need for men at Corbin. His seniority there depended upon the time he began working there. He made the application when he returned from military service and says that he would have made it on July 1, 1945, the day the lay-off occurred at Loyall, had he not been in military service. Respondent recognizes that if peti-

tioner had been working at Loyall at the time the forces were reduced he might have applied for transfer to Corbin on July 1, 1945; that he might have been transferred, and that he might have established seniority at that point as of that date. However, the Selective Training and Service Act cannot be construed as granting to him a seniority which he *might* have obtained had he been working on the job instead of being in military service. *Fishgold v. Sullivan Drydock & Repair Corpn., supra*; *Raulins v. Memphis Union Station Co.*, Sixth Circuit, 168 Fed. 2d 466; *Harvey, et al. v. Braniff International Airways*, Fifth Circuit, 164 Fed. 2d 521; *Hewitt v. System Federation No. 152*, Seventh Circuit, 161 Fed. 2d 545.

Even if the Selective Training and Service Act gave petitioner the preferred standing or super-seniority he claimed over non-veteran employes, which respondent denies, that standing terminated at the end of the one-year statutory period, *Whirls* case, *supra*. The Court of Appeals in the instant case has correctly applied the *Whirls* case, saying (OR. 30):

"Appellant (petitioner) bases his right to the seniority claimed squarely upon the terms of the statute. He was entitled to restoration to employment without loss of seniority for one year after he was taken back into the employ of the company. That period, however, having had elapsed after his restoration to employment, he was not entitled, under the provisions of the law, to the preferred seniority standing which he claimed."

The only question before the District Court on September 12, 1947; was whether petitioner was entitled to the claimed super-seniority or preferred standing (seniority at Corbin from July 1, 1945). When it appeared that the statutory period for the protection of that preferred standing had expired, if such protection was in fact given by the statute, which respondent denies, the Court quite properly dismissed the case as moot. Petitioner makes no claim for loss of time, or that he was damaged in any way during that one-year period.

### CONCLUSION.

Even if it is determined that the writ of certiorari should be issued in case No. 579, John S. Haynes v. Southern Railway System, it should be denied in the instant case, No. 578. All of the facts in the instant case were before the District Court and the Court of Appeals. Both Courts found that those facts did not entitle petitioner to the seniority he claims. A re-examination of those facts requires the same conclusion. No good purpose could possibly be served by a granting of the writ in this case.

We respectfully submit that the petition for writ of certiorari should be denied.

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SUPREME COURT U.S.

IN THE

# Supreme Court of the United States

October Term, ~~1948~~ <sup>1949</sup>

~~No. 878~~ 28

JOHN WALTER OAKLEY, JR.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

~~No. 879~~ 29

JOHN S. HAYNES

vs.

SOUTHERN RAILWAY SYSTEM

ON PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SIXTH CIRCUIT.

## BRIEF OF INTERVENING DEFENDANTS- RESPONDENTS IN OPPOSITION

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Dated at Toledo, Ohio, March 24, 1949.

IN THE  
**Supreme Court of the United States**

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October Term, 1948

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No. 578

JOHN WALTER OAKLEY, JR.

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

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No. 579

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**ON PETITION FOR WRITS OF CERTIORARI TO THE  
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IN THE  
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No. 578

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**BRIEF OF INTERVENING DEFENDANTS-  
RESPONDENTS IN OPPOSITION**

---

**Opinions Below**

The opinion of the United States District Court for the Eastern District of Kentucky, at London, in *John Walter Oakley, Jr., vs. Louisville & Nashville Railroad Co.* (OR. 24)<sup>1</sup> is not officially reported. The opinion of the United States Court of Appeals for the Sixth Circuit (OR. 28-31) is reported at 170 F. (2d) 1008. The opinion of the United States District Court for the Eastern District of

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<sup>1</sup> Reference to the record in *John Walter Oakley, Jr., vs. Louisville & Nashville Railroad Co.* will be indicated by "OR." and in *John S. Haynes vs. Southern Railway System*, by "HR."

Kentucky, at London, in *John S. Haynes vs. Southern Railway System* (HR. 22) is not officially reported. The opinion of the United States Court of Appeals for the Sixth Circuit (HR. 26) is reported at 171 F. (2d) 128.

### **Jurisdiction**

The judgments of the United States Court of Appeals for the Sixth Circuit in *John Walter Oakley, Jr., vs. Louisville and Nashville Railroad Co.* (OE. 28) and in *John S. Haynes vs. Southern Railway System* (HR. 26) were entered on November 22, 1948. The petition for writs of *certiorari* was filed on February 19, 1949, and notice of the filing thereof was served upon counsel for the intervening defendants-respondents on March 5, 1949. The petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254(1).

### **Counter Statement of Questions Presented**

Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, as amended, are of indefinite duration, when the claimed status and seniority are superior to and inconsistent with the status and seniority to which he is entitled under contractual provisions generally applicable to employees similarly situated; or whether the right to such alleged statutory status and seniority terminates upon the expiration of the first year of the veteran's reemployment, leaving his status and seniority to be determined thereafter in the light of contractual provisions applicable to veterans and non-veterans alike.

### **Statement**

In each of the cases presented, the petitioner is an honorably discharged veteran of World War II who sought

reemployment in his former position pursuant to the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U. S. C. App. Sec. 301 *et seq.*, amended 56 Stat. 724, 58 Stat. 598). The facts in the two cases are similar in that in each instance, the petitioner was reemployed in precisely the same position, and with the same seniority date (thus receiving "accumulated seniority" for the period spent in the armed forces, as that which he left to enter the armed forces. Both petitioners, however, sought in these actions to obtain different positions which they assert they would have applied for and received had they not entered the armed forces, with the seniority dates in such different positions which they would have been given had they thus applied for and received such positions.

John Walter Oakley, Jr., the petitioner in No. 578, was employed by respondent Louisville & Nashville Railroad Company as a machinist at Loyall, Kentucky, with a seniority date of July 6, 1943, at the time he entered the armed forces. Upon his return and reemployment, he was given the same classification and seniority at Loyall, but there being insufficient work at that point to entitle one with his seniority to active employment, his status in the restored position was that of a furloughed employee. However, under the provisions of an agreement with respondent System Federation No. 91, he was able to transfer immediately to Corbin, Kentucky, where machinists were needed, and still retain his right to be recalled to Loyall in accordance with his seniority there. (OR. 7.) He was employed as a machinist at Corbin on July 17, 1946, with seniority at that point as of that date, and he retained that position for more than a year thereafter. He alleges that had he not entered the armed forces, he would have effected such transfer on July 1, 1945, and the only relief sought in this

action is that he be accorded seniority as of that date at Corbin.

The seniority right thus asserted by Oakley is predicated entirely on the Selective Training and Service Act. Under the seniority system established by collective bargaining agreements between the Railroad Company and the System Federation, seniority dates from the time the employee starts to work at the point of employment, and is limited to that point. (OR. 8.) There is no allegation or proof of any arrangement, by contract express or implied, whereby employees returning from furlough or leave of absence were entitled to receive a retroactive seniority date such as that which Oakley claims by reason of the Act.

John S. Haynes, the petitioner in No. 579, left a position as machinist helper in the employ of respondent Southern Railway System to enter the armed forces, and upon his return he was reemployed in the same classification, and continued to work as a machinist helper for more than a year after his reemployment. During his absence in the armed forces several other machinist helpers with less seniority as such than Haynes had secured positions as helper apprentices. In this action, filed more than a year after his reemployment, Haynes sought a decree ordering respondent Southern Railway System to accord him a position as helper apprentice, with seniority in that classification dating from February 1, 1943, the time he alleges he would have received such a position had he not entered the armed forces.

The position and seniority thus sought by Haynes is also predicated entirely upon the provisions of the Selective Training and Service Act. There is no allegation or proof of any contractual provision entitling him to the position of helper apprentice or to any retroactive seniority therein. There is no allegation or proof that machinist

helpers returning from furlough or leave of absence were entitled, by contract express or implied, to be given positions and seniority as helper apprentices which they could or would have received had they not been absent.

Both the District Court and the Court of Appeals took the view that in each case the petitioner's right to the position and seniority claimed, if it existed at all, was a special statutory right, and that its duration was limited to one year after the date of petitioner's reemployment. Accordingly both actions were dismissed, since the relief sought would require the granting of the position and seniority claimed after the expiration of the one-year period. In neither case did the courts below pass upon the question of whether during the one-year period the Selective Training and Service Act did confer upon petitioner the rights claimed.

### Argument

Any discussion of the question of the duration of the rights sought to be enforced in these actions necessarily involves the tacit assumption that such rights actually existed. However, as we have pointed out, the courts below did not have any occasion to determine whether these alleged rights existed during the one-year period in question, but merely concluded that whether or not they existed, they could not be enforced for more than one year. Had these cases reached the stage of a hearing on the merits, it would have been our position that no such rights as those asserted by petitioners are conferred by the Selective Training and Service Act, and nothing contained in this brief is intended as a waiver of this position.

The judgments of the Court of Appeals below in these two cases stand simply for the proposition that an employment status and seniority which a veteran claims by virtue of the Selective Training and Service Act only, and to

which neither veteran nor non-veteran employees similarly situated would be entitled as a matter of contract, are not required by the Act to be accorded to the veteran after the expiration of one year from the date of his reemployment. These judgments were based squarely upon the decision of this Court in the case of *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 1328, where the Court answered in the negative the question of " \* \* \* whether under Section 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues." (331 U. S., at 51.)

Our reason for opposing the petition for writs of certiorari in the instant cases is that we believe that it presents precisely the same issue as that already determined by this Court in the *Trailmobile* case, *supra*. The employment rights of a returning veteran must necessarily fall into one or the other of two classes, *ie.*, (1) the contractual rights and incidents of the restored position, or (2) rights which depend for their existence on the statute alone. In the *Trailmobile* case, the veteran, Whirls, claimed that the statute preserved for him indefinitely a status to which he had ceased to be entitled insofar as his contractual rights were concerned. In the instant cases, the veterans Oakley and Haynes assert that the statutory status claimed by them is of indefinite duration, even though they never were entitled to that status as a matter of contractual rights. The only difference between the cases is that in the *Trailmobile* case, Whirls had been entitled to the status claimed by him as a matter of contract right for more than one year after his reemployment, whereas in the instant cases Oakley and Haynes have never been entitled to the status claimed by them as a matter of contract right.

Contrary to the argument advanced by petitioners here, the judgments of the court below do not stand for the

proposition that all of the veteran's employment rights terminate in one year after his reemployment, or that after the one year he may be made the victim of discrimination in favor of non-veterans. There is no discrimination involved in these cases. Oakley and Haynes were asserting rights not possessed by non-veteran employees similarly situated,<sup>2</sup> and the Court merely held that if the Selective Training and Service Act gave them such a preferred standing, that statutory preference was limited to one year's duration. This does not mean that at the expiration of the one-year period Oakley and Haynes automatically lost employment rights which they shared with other employees by reason of the provisions of the contracts governing their employment; but no loss or denial of such contractual rights has been claimed in these actions.

Nor do the judgments below stand for the proposition that upon the expiration of one year after his reemployment, the veteran may no longer recover for failure to accord him rights to which he may have been entitled within the one-year period.

Insofar as petitioner Oakley is concerned, the only relief sought by him was that he be accorded seniority as a machinist at Corbin, Kentucky, dating from July 1, 1945. He does not claim to have suffered any monetary loss by reason of the failure to accord him this seniority date during the one-year period in question, and hence has shown no grounds for any recovery based on such failure.

<sup>2</sup> It is obvious that the only non-veteran employees who could be similarly situated would be those employees returning to active service after a leave of absence from positions similar to those held by Oakley and Haynes when they entered the armed forces. There is no allegation or proof that such employees were accorded the right to retroactive seniority in positions which had been awarded to other employees during their absence, and in fact quite the contrary appears. That Congress approved this basis for determining which non-veteran employees were "similarly situated" is evidenced by the provision, in Section 8(c) of the Act, that "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service. \* \* \* (Emphasis supplied.)"

It would appear that insofar as the allegations of his complaint are concerned, petitioner Haynes did claim to have suffered some slight monetary damage within the one-year period. However, this claim formed no part of the basis on which Haynes appealed from the decision of the District Court, nor was this aspect of the case argued before the Court of Appeals below, or mentioned in that Court's opinion. In view of this background, it cannot be claimed that the judgment of the court below stands for the proposition that the denial of a veteran's statutory rights, whatever they may be, within the one-year period, may not constitute the basis for an award of monetary damages after the expiration of that period. And since the question of the monetary damage claimed by Haynes was never raised before the Court of Appeals, we do not believe that it may properly be presented to this Court as the basis for issuance of a writ of *certiorari*.

### Conclusion

For the reasons stated above, we believe that the decisions below are correct and in accord with applicable decisions of this Court. It is therefore respectfully submitted that the petition for writs of *certiorari* should be denied.

Respectfully submitted,

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Dated at Toledo, Ohio, March 24, 1949:

**Certificate of Service**

I hereby certify that I have served the foregoing document upon all parties of record herein on the 24th day of March, 1949, by mailing a copy thereof to the Solicitor General of the United States, counsel for petitioners John Walter Oakley, Jr., and John S. Haynes; Mr. Carl M. Jacobs, Mr. Cornelius J. Petzhold, and Mr. W. S. Macgill counsel for respondent Cincinnati, New Orleans and Texas-Pacific Railway Company (Southern Railway System); and Mr. C. S. Landrum and Mr. H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

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**FILED**  
MAR 21 1949

**29**  
No. ~~470~~

CHARLES ELMON CHAPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, ~~1948~~ '49

JOHN S. HAYNES

v.

SOUTHERN RAILWAY SYSTEM

Brief of Respondent in Opposition to  
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No. 579

IN THE

# Supreme Court of the United States

October Term, 1948

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JOHN S. HAYNES

v.

SOUTHERN RAILWAY SYSTEM

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Brief of Respondent in Opposition to  
Petition for Writs of Certiorari

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether, under Section 8(c) of the Selective Training and Service Act of 1940, this cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

## STATEMENT

The petitioner's statement respecting the *Haynes* case is incorrect in that it fails to point up the facts: that Haynes did not file his complaint *until fifteen months after the date of his reemployment*; and that the record discloses *no protest* made during those fifteen months after reemployment at the same job and classification he left and with seniority as of July 6, 1940, *the date of his original employment*.

The petitioner's statement is also inaccurate in that in fact the District Court's order of dismissal recites no authority whatever for the order; and, there being no District Court opinion, there is therefore no basis for petitioner's statement that *Trailmobile Co. v. Whirls*, 331 U. S. 40, was the authority for that Court's order.

Finally, the appellant before the Circuit Court of Appeals made no claim that he was entitled to back wages and this aspect of the case, having not been urged before the Circuit Court, cannot be presented as a justiciable controversy to this Court. *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458.

### REASONS FOR NOT GRANTING THE WRIT

The decision of the Circuit Court is correct.

Petitioner contends that the District Court entered its Order of Dismissal upon the sole authority of *Trailmobile Company, et al. v. Whirls*, 331 U. S. 40, which does hold that the statutory preference given to a veteran by the Act is effective for no more than the specified year. To that extent, petitioner's contention is correct. But respondent contends that there is authority in addition to the *Trailmobile* case sufficient to sustain the dismissal by the District Court.

Some of the separate and independent benefits of the Act may be said to be protection for one year, seniority, pay and status, together with the right to damages for violation of the Act by an employer.

There are numerous cases which hold that laches on the part of the returned veteran destroys his right to back pay.

In *Dacey v. Bethlehem Steel Co.*, 66 F. Supp. 161 (D. C. D. Mass.), the Court held that where the veteran delays an unreasonable length of time in enforcing his demands, it is unfair to the employer to be compelled to pay compensation for the interim period. In *Schreier v. Fishman Co.* (D. C., N. J.), February 4, 1947, 20<sup>th</sup> LRRM 2479, a

veteran first rejected the employment offered him by his former employer, and then accepted employment for a substantial period of time without protest of any kind, but later protested through the filing of a complaint alleging non-compliance with the Act. The Court said that the petitioner had forfeited his rights. One of the reasons given for this conclusion was that he "was given employment which was satisfactory and which he accepted and was paid for without protest against what he was paid." For this and other reasons no more persuasive than this one, the Court dismissed the complaint. See also *Azzerone v. W. B. Cagon Co.*, 73 F. Supp. 869 (1947) (D. C. W. D. N. Y.).

In *Daniels v. Barfield*, 77 F. Supp. 283 (April 8, 1948, D. C. E. D. Pa.), the delay of a veteran for seven months after discharge to make formal demand for reinstatement and benefits under the Selective Training and Service Act was held so unreasonable as to amount to acquiescence in his employer's action and resulted in forfeiture of his rights under the Act.

The Court stated:

"The very essence of Sec. 308(e) is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it, but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendant and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefit."

In *Anglin v. C. & O. Ry. Co.*, 77 F. Supp. 359 (April 22, 1948, D. C. S. D. W. Va.), it was held that an unreasonable delay in enforcing a demand under the Selective Training and Service Act resulted in the refusal to award any compensation for the interim period. To the same effect is

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*Noble v. International Nickel Co.*, 77 F. Supp. 352 (April 28, 1948, D. C. S. D. W. Va.).

In *Polansky v. Elastic Stop Nut Corporation*, 78 F. Supp. 74 (April 27, 1948, D. C. D. N. J.), it was held that a veteran's right to back pay was lost by laches.

It should be obvious and it is just that, if delay and acquiescence warrant a forfeiture of any right to back pay, all of the other independent benefits of Sec. 8(c) should likewise be held to be lost in similar fashion. The Court so held in *Cummings v. Hubbell*, 76 F. Supp. 453 (March 5, 1948, W. D. Pa.).

It is respectfully submitted that the delay of fifteen months evidenced by the record in this case between the date of reemployment and the filing of the complaint amount to laches and acquiescence in the entire situation such as to warrant a forfeiture of any rights Haynes may have had, had he acted within a reasonable time.

### CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

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FILED

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IN THE

Supreme Court of the United States

MOORE CROPLEY  
CLERK

October Term, 1949

No. 28

28

JOHN WALKER GANLEY, JR., Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., et al.

No. 29

29

JOHN S. HAYNES, Petitioner,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC

RAILWAY COMPANY, et al.

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October 8 1949.

IN THE  
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October Term, 1949

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No. 28

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On Writs of Certiorari to the United States Court of  
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IN THE  
**Supreme Court of the United States**

October Term, 1949

No. 28

JOHN WALTER OAKLEY, JR., *Petitioner*,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.

No. 29

JOHN S. HAYNES, *Petitioner*,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC  
RAILWAY COMPANY,<sup>1</sup> ET AL.

On Writs of Certiorari to the United States Court of  
Appeals for the Sixth Circuit

**BRIEF OF INTERVENING DEFENDANTS.  
RESPONDENTS**

**OPINIONS BELOW**

The United States District Court for the Eastern District of Kentucky, at London, entered its order dismissing each case without opinion. (O. R. 18; H. R. 15:)<sup>2</sup> The opinion of the United States Court of Appeals for the Sixth Circuit in No. 28 (O. R. 21-23) is reported at 170 F. (2d) 1008; and that court's *per curiam* opinion in No. 29 (H. R. 17) is reported at 171 F. (2d) 128.

<sup>1</sup> The petition named Southern Railway System as respondent. By order of this Court, dated May 2, 1949, the name now appearing was substituted.

<sup>2</sup> Reference to the record in No. 28, *John Walter Oakley, Jr. vs. Louisville & Nashville Railroad Co., et al.*, will be indicated by "O. R.", and in No. 29 *John S. Haynes vs. Cincinnati, New Orleans and Texas Pacific Railway Company, et al.*, by "H. R."

## JURISDICTION

The judgments of the Court of Appeals were entered on November 22, 1948. (O. R. 21; H. R. 17.) The petition for writs of certiorari was filed on February 19, 1949, and was granted on April 4, 1949 (O. R. 23; H. R. 18). The petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

### COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, as amended, must be accorded to him for a period of more than one year (a) when there is no showing of any contractual right of the veteran to hold or retain such status and seniority, and (b) when it appears that the claimed status and seniority are different from and inconsistent with the status and seniority to which he would be entitled under the only contractual provisions governing the employment of the veteran and his fellow employees.

2. Whether Section 8 of the Selective Training and Service Act entitles a veteran, who has been restored to the same position in private employment which he left to enter the armed forces, with full seniority credit in that position for the period of his absence, to be given a completely different position and seniority status because he claims he could or would have achieved that different position and status had he remained "on the job" in the active service of his employer, instead of being absent in the armed forces; or is he to be considered as having been on furlough or leave of absence, instead of "on the job," during the period of his military service, and, upon being restored to his former position without loss of seniority,

to be accorded only the same rights as those accorded to non-veteran employees returning to similar positions from leaves of absence for comparable periods.

### STATUTE INVOLVED

The questions presented in this case relate to the proper interpretation to be given to the following portions of Section 8 of the Selective Training and Service Act of 1940, as amended, (54 Stat. 885, 50 U. S. C. App. Sec. 301 *et seq.*) as amended by the Act of July 28, 1942 (56 Stat. 723), the Act of December 8, 1944 (58 Stat. 798), and the Act of June 29, 1946 (60 Stat. 341):

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. \* \* \*

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service — —

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; \* \* \*

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of

4  
subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such service, and shall not be discharged from such position without cause within one year after such restoration."

### STATEMENT OF THE CASE

In each of the cases presented the petitioner is an honorably discharged veteran of World War II who asserts that he has not been accorded certain rights in connection with his employment to which he claims to be entitled by virtue of the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended. In each instance the petitioner made application for reemployment within the 90-day period prescribed by the Act, and was reemployed; but each claimed that he was not accorded the proper employment status and seniority.

John Walter Oakley, Jr., the petitioner in No. 28, was employed by respondent Louisville & Nashville Railroad Company (hereinafter referred to as L. & N.) as a machinist in its Loyall, Kentucky, shops prior to his entry into the armed forces. As an incident of that position, he possessed certain seniority rights under a collective bargaining agreement between the respondent System Federation No. 91 of the Railway Employees' Department of the American Federation of Labor, the statutory representative of his craft or class (O. R. 5-6, 11—Admission No. 22), and the respondent L. & N.

Under that agreement, seniority rights were confined to the point on the railroad where the individual was employed, and an employee's seniority date was the date on which he first started to work at that point. (O. R. 6, 11—Adm. No. 23.) Also, under that agreement, men who were furloughed (laid off in force reduction) were to be given preference if they wished to transfer to another point on the railroad where additional men were needed, and would still retain their furloughed status at their "home point." Thus, if additional forces were again needed at their home point, they would be recalled in order of their old seniority, and could then elect whether to go back or remain at the point to which they had transferred. (O. R. 6, 11—Adm. No. 23.)

While Oakley was in the armed forces, a number of machinists senior to him were laid off in a force reduction at the Loyall shops. (O. R. 4, 10—Adm. No. 6.)<sup>2</sup> This condition still prevailed at Loyall when Oakley received his discharge from the armed forces and applied for reemployment, so that there was no work available to which he was entitled to be assigned by virtue of his seniority at that point. (O. R. 5, 10—Adm. No. 16.) However, throughout his service in the armed forces, and at the time he applied for reemployment, Oakley had retained and was accorded seniority at Loyall dating from July 6, 1943, the date he started working as a machinist at that point (O. R. 13—Affidavit of H. Feather); so that, upon applying for reemployment, he was restored to his former position at Loyall as a furloughed machinist, with his old seniority date (thus getting "accumulated seniority" for the period spent in the armed forces), and was entitled to be recalled to work at Loyall in accordance with his seniority (O. R. 5, 10—Adm. No. 18.).

<sup>2</sup> The railroad's Loyall shop was not transferred to Corbin, Kentucky as stated by petitioners. (Petitioners' Brief, p. 6.)

Having been thus restored to his former position, on July 18, 1946, Oakley filed an application for a job as machinist at Corbin, Kentucky, in accordance with the aforesaid provision of the collective bargaining agreement giving furloughed men preference to transfer to other points on the railroad where men were needed. However, in connection with his application for such transfer, he asserted that had he not been in the armed forces, but been working at Loyall when the force reduction took place there on July 1, 1945, he would at that time have applied for a transfer to Corbin, and received a seniority date of July 1, 1945, at that point. For that reason he was requesting that he be given seniority at Corbin retroactive to July 1, 1945. (O. R. 4, 10—Adm. No. 10.) This latter request was denied because the collective bargaining agreement provided that seniority in a new position commences on the date on which the employee first starts to work in such new position. His application for transfer was granted, however. He started working as a machinist at Corbin on July 18, 1946, and was placed on the machinists' seniority roster at Corbin with seniority as of that date. (O. R. 5, 10—Adm. No. 12 and 13.)

The complaint does not allege, nor does it anywhere appear in the record of this case, that any other employee of the respondent L. & N., either veteran or non-veteran, has ever been accorded the privilege of transferring to a new point of employment, and a new position with a retroactive seniority date at the new point, or that any employee has ever been accorded a seniority date prior to the date on which he commenced work in a new position. As we have noted, the applicable collective bargaining agreement prohibits such a practice. It is not claimed that any non-veteran employee laid off in a force reduction, while on a leave of absence for sickness or other reason, was entitled, upon reporting back to work and finding himself on

the furlough list, to transfer to another point with a seniority date at the new point retroactive to the date he claims he would have transferred there had he not been on leave of absence when the force reduction occurred. And it is conceded that none of the employees on the machinists' roster at Corbin over whom Oakley seeks to be advanced hold seniority dates prior to the dates on which they started to work as machinists at Corbin. (O. R. 5, 21—Adm. No. 21.) Nowhere in the complaint is there any allegation as to the source of the right claimed by Oakley. The action is predicated solely upon the Selective Training and Service Act and no contractual rights of any sort are alleged.

The only relief sought by Oakley in this action is that he be accorded seniority as a machinist at Corbin, Kentucky, dating from July 1, 1945, instead of from July 18, 1946, the day on which he first started to work as a machinist at that point. No claim to monetary damages was asserted.

John S. Haynes, the petitioner in No. 29, alleged in his complaint that prior to his enlistment in the armed forces, on January 1, 1942, he had been employed by respondent Cincinnati, New Orleans and Texas Pacific Railway Company, (hereinafter referred to as C. N. O. & T. P.) as a machinist helper at its shops at Somerset, Kentucky. Upon his return from the armed forces he applied for reemployment, and was reemployed in the same classification, that of machinist helper, on November 16, 1945.

In his complaint Haynes states "that said employment of machinist helper was not the employment to which he was entitled had he been given the seniority that he would have had, had he remained in the employment of the company during the period of his service in the Armed Forces." (H. R. 2.) It is further alleged that six machinist helpers

"junior in seniority" to Haynes had been "promoted" to positions as helper apprentices during his absence in the armed forces, and that had he not entered the armed forces he would have been similarly promoted "not later than February 1, 1943." (H. R. 2.) The following relief is requested in the prayer of the complaint: (1) that the court adjudge and decree that Haynes is entitled to be restored to "the seniority status" that he "would have had in his employment with the defendant company" had he not entered the armed forces; (2) that the court adjudge and decree that Haynes was entitled to be reemployed as a helper apprentice (rather than in his former position as a machinist helper) and entitled to all pay increases given helper apprentices since February 1, 1943; and (3) that Haynes recover "the increase in wages which he would have been entitled to receive had he been reemployed as a helper apprentice" with pay increases from February 1, 1943. (H. R. 2-3).<sup>4</sup>

The complaint contains no allegation that any seniority *rights* (as compared with "seniority," which is merely length of service) pertained to the position of machinist helper which Haynes left to enter the armed forces. While it purports to convey the inference, in referring to the promotion of men "junior in seniority to himself," that his seniority as a machinist helper entitled Haynes to be promoted to a position as helper apprentice, the complaint is silent as to the source of any such right. The action is predicated solely upon the Selective Training and Service Act, and no contractual rights of any sort are alleged.

For purposes of clarification some reference should perhaps be made to the answer of the respondent C. N. O. & T. P. wherein it is alleged that certain contractual

<sup>4</sup> The wage claim asserted appears to encompass the periodic raises given helper apprentices as they progress in their apprentice training program. See paragraph 9 of the complaint, where Haynes states that he "would have received a like raise every six months thereafter." (H. R. 2)

rights and incidents did pertain to the position of machinist helper which Haynes left to enter the armed forces. (H. R. 6-8.) Although in this case we believe that in passing upon the motion to dismiss the District Court was limited to considering the allegations of the complaint, yet it may be urged that the answer of said respondent may be taken advantage of by petitioner, and that it cured the failure of the complaint to allege any contractual basis for petitioner's claim. If such contention be advanced, then it should be noted that under the contractual provisions, established rules, and custom alleged in said answer, petitioner Haynes was not eligible for promotion to a position as helper apprentice either at the time he entered the armed forces or upon his return and reemployment; that he did not become eligible therefor until September of 1946; that since September of 1946 there have been no vacancies in the classification of helper apprentice to which he could have been promoted; and that irrespective of the question of his eligibility, employees of said respondent returning from leave of absence were not entitled to be given promotions which had been awarded to junior employees during their absence.

Both the District Court and the Court of Appeals below took the view that in each of the cases at bar the petitioner's right to the position and seniority claimed, if it existed at all, was necessarily a special statutory right, and that its duration was therefore limited to one year after the date of petitioner's reemployment. Accordingly both actions were dismissed, since the relief sought could not be granted without holding that a statutory right to the position and seniority claimed still existed after the expiration of the one-year period. In neither case did the courts below pass upon the question of whether the Selective Training and Service Act did in fact entitle the petitioner to the claimed position and seniority within and during the one-year period.

## SUMMARY OF ARGUMENT

Because these cases involve questions largely relating to seniority and seniority rights, we shall preface our argument with a brief discussion of the nature and sources of seniority rights. We shall point out that legal rights in connection with length of service do not spring into existence automatically, but must have their basis in a contract or a statute.

Referring then to the situation here presented, we shall demonstrate that if the petitioners have any rights to the seniority and employment status which they claim, such rights must be predicated upon a statutory basis, because (a) the complaints fail to allege the existence of any contract or of any facts which would give rise to a contractual relationship other than that of an employment at will, and (b) if the record in each case be considered as a whole, the contractual seniority systems thus disclosed fail to entitle petitioners to the status and seniority claimed, and in fact would require the rejection of their claims.

We shall then show that any purely statutory rights such as those asserted by petitioners under the Selective Training and Service Act were guaranteed by that Act for the period of one year only, and that although a denial of such rights within that period may be completely rectified, no relief may be granted for a failure to accord a veteran such rights after the expiration of the year.

And finally, we shall show that irrespective of the question of the duration of the statutory rights upon which petitioners base their claims, there were other proper grounds for dismissal of the complaints which require affirmance of the decisions of the courts below. It is our position that in neither case did the complaint allege facts showing the denial of any statutory or contractual right to the status and seniority claimed, and that the Selec-

tive Training and Service Act did not in fact confer the asserted rights even within the one-year period. We will point out that neither petitioner claims that he was not restored to the same position as that which he left to enter the armed forces, with all the rights and incidents of such position, including accumulated seniority for the period of his service in the armed forces, or that, upon being so restored, he was not considered as having been on furlough or leave of absence during that period; and that the Act did not require that petitioners be restored to completely different positions from those which they left, and accorded a seniority status which they could otherwise have obtained only by remaining "on the job" in the active service of their employers, when the seniority system in effect at the time they entered the armed forces and at the time of their return withheld such rights from non-veteran employees returning to active service from leaves of absence.

## ARGUMENT

### **I. PETITIONERS ARE ASSERTING SPECIAL STATUTORY RIGHTS DEPENDING FOR THEIR EXISTENCE SOLELY UPON THE PROVISIONS OF THE SELECTIVE TRAINING AND SERVICE ACT.**

#### **A. Nature and Scope of Seniority Rights in General**

It is well established that legally enforceable seniority rights arise out of and exist solely by reason of some contract or statute, and that their nature and scope may be determined only by reference to the provisions of the contract or statute creating them. Mere "seniority" does not bring any rights into being in and of itself. It has never been held that the mere length of the period of employment can create any legal rights in the employee in rela-

tion to that employment. This conclusion is amply supported by authority, and the rule is well stated in the case of *Ryan vs. New York Central R. R. Co.*, 267 Mich. 202, 255 N. W. 365, where the court said:

“He (the employee) has no inherent right to seniority in service nor do such rights arise out of his employment by the railroad company except as provided for in the contracts entered into and the rules adopted by the company relating thereto.” (Portion in parentheses not a part of quotation.)

This principle was recognized and the opinion in the *Ryan* case quoted with approval by this Court in the very case which forms the basis for much of our discussion here, and which was relied upon by the courts below. In that case, *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 1328, the Court's opinion contains the following explanatory footnote with reference to “seniority”:

“21

Seniority arises only out of contract or statute. An employee has ‘no inherent right to seniority in service . . . .’ *Ryan vs. New York C. R. Co.*, 267 Mich. 202, 208, 255 N. W. 365; *Casey vs. Brotherhood of Locomotive F. E.* 197 Minn. 189, 191, 192, 266 N. W. 737. ‘The seniority principle is confined almost exclusively to unionized industry.’ Decision (1946) 46 Col. L. Rev. 1030, 1031, and authorities cited. ‘In private employment seniority is typically created and delimited by a collective bargaining agreement . . .’ *Ibid.*” (331 U. S., 53.)

This principle was reiterated and elaborated upon to some extent in the more recent opinion of this Court in the case of *Aeronautical Industrial Dist. Lodge 727 vs. Campbell*, 331 U. S. 521, where it is stated:

“Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are

to unionized industry. See *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 53, note 21, 91 L. ed 1328, 1337, 67 S. Ct. 982. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See *Williamson & Harris, Trends in Collective Bargaining*, 100-102 (1945); *Harbison, Seniority Policies & Procedures As Developed Through Collective Bargaining* 1-10 (1941)."

It is thus clear from the above authorities<sup>5</sup> that petitioners cannot possess any legally enforceable right to the employment status and seniority which they claim in these cases unless it is based either on a contract or a statute.

<sup>5</sup> A few of the many other cases adopting this principle are as follows: *Aden vs. Louisville & N. R. Co.*, 276 S. W. 511; *Aulich vs. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560; *Austin vs. Southern Pac. Co.* 123 Pac. (2d) 39 (Calif. 1942); *Boucher vs. Godfrey*, 119 Conn. 622, 178 Atl. 655; *Donoran vs. Trotters*, 285 Mass. 167 188 N. E. 705; *Edelstein vs. Duluth, Missabe & Iron Range Ry. Co.*, 226 Minn. 508, 31 N. W. (2d) 465 (1948); *Elder vs. N. Y. C. R. R. Co.*, 152 F. (2d) 361 (C. C. A. 6th, 1945); *Madera vs. Monongahela Ry. Co.*, 356 Pa. 460, 62 A (2d) 329 (1947); *Order of Railway Conductors vs. Shaw*, 119 P. (2d) 549 (Okla. 1941); *Polanskey vs. Monongahela Ry. Co.*, et al., 342 Pa. 188 19 A. (2d) 377; *Shaw vs. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So 327.

## B. Statutory Basis of the Rights Asserted By Petitioners

### 1. *Failure of the complaints to allege any contractual rights*

In each of these cases the complaint reveals absolutely no source other than the Selective Training and Service Act for the rights asserted, and the jurisdiction of the District Court was predicated upon the provisions of that statute. No contractual rights of any sort are alleged.

Petitioners have contended that this Court may only consider the allegations of the complaints in these cases, and that there was no showing that the contractual seniority system did not grant them the rights asserted. (Petitioners' Brief, p. 13-15; footnote 9, p. 33.) Insofar as the complaints standing alone are concerned, there is nothing before this Court to establish the existence of any seniority *rights* of the petitioners unless such rights are conferred by the Selective Training and Service Act alone. No "framework of a seniority system" is pleaded. Nothing in the complaints indicates whether petitioners possessed seniority rights which would have endured for a day, a month, or a year or more, if petitioners had not entered the armed forces. There is no description of the scope of any seniority rights, the privileges attendant upon them, or the manner of their exercise. Aside from references to the Selective Training and Service Act, there is no fact alleged in either complaint which would show any legal attributes of petitioners' employment other than those of an employment at will.

We submit that it was not the obligation of the respondents or these intervening defendants to establish that petitioners were *not* "entitled to the position they claim by mere operation of the seniority system." (Petitioners' Brief, p. 13.) If petitioners wished to take advantage of the existence of a seniority system, and thus avoid the ef-

fect of the limited duration of the special statutory rights which they asserted, it was up to them to do so in their pleadings. Having refrained from pleading any seniority framework, perhaps because, as we shall demonstrate later, it was not favorable to their contentions, they cannot now ask the Court to indulge in a presumption that had they pleaded it, it would have sustained their claims.

2. *Failure of the contractual seniority systems revealed by the records in these cases to entitle petitioners to the status and seniority claimed.*

It may be asserted that a consideration of the entire record in each case will reveal an admission on the part of respondent that contractual rights did pertain to petitioners' employment, and that therefore their claims may not properly be classified as embodying purely statutory guarantees which would be of limited duration. At this point in our discussion we merely wish to point out that while the record in each case does indicate the existence of seniority systems governing petitioners' employment, the systems as thus revealed supply no contractual basis for the claims asserted by petitioners.

Insofar as the *Oakley* case is concerned, the seniority system revealed by the petitioner's admissions and the pleadings of the respondents not only failed to establish any contractual right in any employee to establish a retroactive seniority date under any circumstances, but positively forbade such practice. Since the only relief sought by *Oakley* is a retroactive seniority date at Corbin, it is clear that the record as a whole reveals no contractual basis for his claim.

With respect to the *Haynes* case, while it may be contended that the answer of the respondent C. N. O. & T. P. discloses the existence of some contractual provisions governing *Haynes*' employment, it not only does not establish

a contractual right in Haynes to have retroactive seniority as a helper apprentice, but is silent as to whether any seniority rights at all even pertained to the classification of helper apprentice in that respondent's employ.

It is thus clear that the employment status and seniority claimed by the petitioners is in the nature of a special statutory preference. They assert a right to be given positions different from those which they left to enter the armed forces, and say that they are entitled to "seniority" in those positions antedating the date of their return from military service. The claims thus asserted are supported by no contractual provision, and no *rights* attendant upon the claimed "seniority" are shown. Taking the view that we here advance, the courts below held that if petitioners possessed any such rights as those asserted, they would necessarily depend for their existence solely upon the provisions of the Selective Training and Service Act; and that even if that Act did create any such rights, they were of limited duration, and could not be enforced for more than one year from the date of petitioners' reemployment. This question of the duration of such statutory rights will be discussed in the following portion of our argument.

## **II. PURELY STATUTORY RIGHTS SUCH AS THOSE HERE ASSERTED UNDER THE SELECTIVE TRAINING AND SERVICE ACT WERE GUARANTEED BY THAT ACT FOR A PERIOD OF ONE YEAR ONLY.**

As the claimed source of the statutory rights here asserted, petitioners have relied only upon certain provisions contained in Section 8 (c) of the Selective Training and Service Act. Although, as we shall point out later, we do not concede that any such rights existed at all, it is apparent that there is no other portion of the Act which could conceivably be the source of any such rights as are here asserted.

With the exception of the concluding clause of Section 8 (c), which contains the prohibition against discharge without cause, all of the provisions of the section are merely descriptive of the status to which the veteran is required to be restored. Petitioners contend that these provisions do more than impose an obligation which can be completely fulfilled by restoration to the status described. They contend that an additional statutory guarantee of a right in the veteran to *retain* the described status must be implied, and that such guarantee is of indefinite duration. It is our position that whatever may be the nature of the status and rights to which the Act requires the veteran to be *restored*, the only guarantee of any right to *retain* that status and those rights for any period of time is contained in the concluding clause of Section 8 (c) which states that the veteran "shall not be discharged from such position without cause within one year after such restoration." Thus the guarantee of the right to retain the restored status is specified to be of one year's duration only; and since the only possible basis for petitioners' claims is in the restoration provisions of Section 8 (c), the rights asserted in these cases could not be enforced for more than one year.

Throughout their argument counsel for petitioners repeatedly refer to the issue in these cases as being one of whether the Selective Training and Service Act "limited" the rights asserted to one year. Thus it is stated that "The sole provision limiting protection to a year is the guarantee that the veteran shall not be discharged from such position without cause within one year after such restoration." " (Petitioners' Brief, p. 19.) We think that this is a complete misconception of the purpose and effect of the language of Section 8.

We believe that rather than constituting a limitation upon veterans' employment rights, the language quoted by

petitioners is in fact the only affirmative statutory guarantee to the veteran of any rights extending beyond the instant of his reemployment.<sup>6</sup> Thus, the statute provides that the veteran's employer, upon proper application, shall restore him "to such position (the position which he left to enter the armed forces) or to a position of like seniority, status and pay . . ." (Sec. 8 (b) (B); portion in parentheses not a part of quotation.) It then requires that:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered* as having been on furlough or leave of absence during his period of training and service in the land or naval forces, *shall be so restored* without loss of seniority, *shall be entitled* to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . ." (Sec. 8 (c), emphasis supplied.)

These provisions of the Act comprise all of the obligations placed upon the private employer except that referred to by petitioners as constituting a "limitation." Actually, all of these obligations can be complied with at the instant of restoring the veteran to his former position. The only continuity which they have must, therefore, be derived from the provision against discharge "from such position" for one year. In the absence of that provision, the veteran's only recourse against discharge immediately following his restoration would have to be found not in the Act, but in whatever contractual rights and incidents may have attached to his restored position.

<sup>6</sup> If the veteran's restored position embodied any contractual rights and incidents, they would of course be of a continuing nature; but their continuity would be derived from, and the period of their duration fixed by the contract creating them, and not the statute.

We believe that the issue presented is governed by the previous decision of this Court in the case of *Trailmobile Co. vs. Whirls, supra*, where the Court answered in the negative the question of "... whether under Section 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his re-employment, being unaffected by that event as long as the employment itself continues." (331 U. S. 51.) In that case the veteran, Whirls, not only claimed that the statute entitled him to be restored to his former position without loss of seniority, and to be free from being discharged without cause for one year thereafter, but also that it guaranteed him the right to retain his restored status and seniority for as long thereafter as his employment should continue.

The Court rejected this claim, and held that the statutory right thus asserted was of limited duration, and that the Act did not operate to preserve for more than one year any rights in connection with the veteran's restored status which were accorded him under the statute, by virtue of his veteran status, and were not possessed by his non-veteran fellow employees as a matter of contract right.

The argument set forth at pages 17 to 22 of petitioners' brief is, insofar as we can analyze it, simply a repetition of the same identical argument, with respect to severability of the concluding phrase from the other provisions of Sec. 8 (c), as that which this Court rejected in the *Trailmobile* case. Thus, at page 19 of petitioners' brief, we find the following statement:

"But it would seem to be a gross distortion of the ordinary meaning of words to interpret a prohibition against discharge as creating a restriction upon the duration of other rights which contain no time limitation."

And at page 22:

"It is apparent, therefore, that the one-year guarantee against discharge has its own separate scope and does not operate to shorten the life of other benefits which are conferred without time restrictions."

In rejecting this line of argument, this Court said in the *Trailmobile* case:

"The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged. Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior 'restoration' clauses . . .

"To tear the concluding clause from its context is therefore impossible. It is conjunctive with all that precedes. Nor is it any the more permissible to disconnect its constituent temporal term . . ."  
(331 U. S., 55.)

— The analogy between the *Trailmobile* case and the cases at bar may be more sharply drawn by a hypothetical change in the facts of that case. Let us assume that the agreement modifying Whirls' seniority rights had been negotiated not after the expiration of the one-year period in question, but within that period, or even during his absence in the armed forces. Assuming, as this Court did for purposes of its discussion, that such modification violated a statutory right guaranteed Whirls by the Selective Training and Service Act to have his old seniority rights restored to him, the question arises as to whether, more than one year after his reemployment, the Court would have ordered the Trailmobile Company to accord Whirls, as of that time and for the future, his old seniority. We think that it would not; and if Whirls asserted no claim for money damages suffered within the one-year period,

by reason of the withholding of his supposed statutory seniority, then just as in the instant cases, his case would have been dismissed as moot.

The distinction between the case of a veteran who claims a particular status and seniority by virtue of the statute alone, and the case of a veteran possessing a *contractual right to retain* the status and seniority to which he has been restored, is, we believe, vital to any consideration of the question of the duration of the veteran's rights in connection with his employment. If, as in the instant cases, the veteran has no *contractual rights* to retain the seniority rights which he asserts, then it cannot be said that a failure to accord him the claimed statutory rights within and during the one-year period of their duration has any detrimental effect upon his employment status after the termination of those rights. Therefore, in order to rectify the claimed violation of the statute, it is only necessary to recompense the veteran for any damage that he may have suffered during the year.

This proposition is perhaps best illustrated by the example of a simple employment at will, where no express contractual rights attached to the "position" which the veteran left to enter the armed forces and to which he is required to be restored. There is no collective bargaining agreement, and no express contract of employment guaranteeing any rights in connection with the position occupied. In such a situation the statutory rights of the returning veteran are reduced to two bare essentials: (1) the right to reemployment, conferred by Section 8 (b) (B), and (2) the guarantee of Section 8 (c) against a discharge without cause during the one-year period following that reemployment. It is thus obvious that in such circumstances, the end of the statutory year would mark the complete termination of all employment rights conferred by the Act.

It is equally obvious that in other types of employment where certain specific rights, such as seniority rights, inure to the position by reason of a collective bargaining agreement or an individual contract of employment, their continued existence beyond the one-year period in question must depend upon the continued existence of the contract. If the contract be changed, as in the *Trailmobile* case, then the rights are changed; and if it be terminated, then the rights end. We submit, then, that the reemployed veteran's statutory rights exist only during the one-year period, and where a veteran who has been reemployed for more than one year seeks to establish rights in connection with his employment after the expiration of that period and for the future, he is confined to the enforcement of contract rights in a contract action, and cannot predicate a cause of action on the Selective Training and Service Act.

However, we are not concerned in these cases with the situation where the veteran, if reemployed, thereafter possesses a contract right to retain the position to which the statute entitles him. In such a situation—it might well be argued that in a judgment rendered after the expiration of the one-year period, a failure to accord the veteran his statutory reemployment rights could not be rectified by an award of damages suffered within the year; for the failure to secure the statutory reemployment may have deprived the veteran of contract rights extending beyond the year, if the contract remained in effect that long. In such case, *and upon a showing that had the veteran been accorded his statutory rights within the year, he would thereupon have become the possessor of contract rights, extending beyond the year, to the position claimed*, then we believe that the only manner in which a court could rectify the violation of the statute would be to require the veteran to be restored to his contract rights, with damages, if any, to the date of such restoration; or, if the con-

tract rights had terminated, by modification or expiration of the contract, prior to the entry of the court's judgment, then the court would be limited to an award of damages for the period of the statutory year plus the period thereafter up to the date on which the veteran's contract rights would thus have terminated, had he been reemployed in accordance with the statute. Such a judgment would, we believe, be justified in an action based on the Selective Training and Service Act, because the court would be rectifying a violation, or denial, of statutory rights which had taken place within the one-year period of the duration of such rights. But such a judgment would not be based upon the assumption that the statutory employment rights of the veteran were of more than one year's duration; it would merely stand for the proposition that a court may give complete relief for a violation of those rights occurring within the year. Thus, where a veteran had been accorded the reemployment required by the statute, even though his contract rights might be coextensive with his statutory rights, an alleged violation of his rights occurring after the expiration of the year (as in the *Trailmobile* case) could not be remedied by an action under the Selective Training and Service Act, since there would be no violation of that Act to be rectified; but the veteran would be left, as was Whirls, to whatever relief he might obtain for violation of his contract rights or, in an appropriate situation, for the type of discrimination which this Court held actionable in the cases of *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, and *Wallace Corp. vs. National Labor Relations Board*, 323 U. S. 248.

It is clear from the above discussion that it is not our position, nor was it held by the courts below, that at the expiration of the statutory one-year period, all rights of the reemployed veteran with respect to his employment

automatically terminate. Such a position would of course require the conclusion that the obligation of reemployment itself, imposed by Section 8 (b), subsection B, did not contemplate that the veteran would be restored to all of the contractual rights and incidents of his former position, but merely required the furnishing of one year's temporary employment following his return from the armed forces.

We believe, rather, that whatever rights of a contractual sort (an employment relationship being essentially contractual in nature) might pertain to the restored position would be unaffected by the passing of the statutory year; but that any rights attaching to that position solely by reason of the statute, and which no contract gives the veteran the right to hold and retain, would expire, and could not be specifically enforced beyond the one-year period of their duration.

It should be noted that the proposition just set forth does not involve the imposition of a statute of limitations upon the veteran's assertion of his statutory rights. It merely makes the statutory rights of limited duration in a substantive sense. Thus, a suit brought by the veteran *under the Act* must be based on a cause of action, for denial of such statutory rights, *accruing within* the one-year period, and any *judicial relief* afforded under and pursuant to the Act may not be such as to enforce the *statutory* rights beyond the period of their duration.

It is true, as petitioners contend in their brief, pages 34-36, that insofar as the allegations of his complaint are concerned, petitioner Haynes did claim to have suffered some slight monetary damage accruing within the one-year period. We think we have made it clear that it is not our position that a claim to be recompensed for such damage is defeated by the expiration of the one-year period. However, this claim formed no part of the basis on which Haynes appealed from the decision of the District Court,

nor was this aspect of the case argued before the Court of Appeals below, or mentioned in that Court's opinion. The claim for money damages was obviously of secondary importance insofar as Haynes was concerned.

In view of this background, it is hardly proper for petitioners now to assert, as they do, that the judgment of the court below stands for the proposition that the denial of a veteran's statutory rights, whatever they may be, within the one-year period, may not constitute the basis for an award of monetary damages after the expiration of that period. And since the question of the monetary damages claimed by Haynes was never raised before the Court of Appeals, we do not believe that it may properly be presented to this Court as the basis for a reversal of the judgment below.

As their final argument, petitioners urge that in these cases the period of the statutory guarantee may not be deemed to have begun because they were never restored to the jobs to which they alleged they were entitled. (Petitioners' Brief, p. 37-39.)

This contention has no bearing on the principle issue involved in this case, that is, whether or not the special statutory rights are of limited or of indefinite duration. It goes rather to the question of the nature of the relief which a court should afford to rectify a denial of the statutory rights occurring within the statutory year, which we have already discussed at some length.

In the course of our argument we have referred to the various situations in which a court may be called upon to rectify a denial of the rights conferred by the statute. In connection with each situation we stated our belief that a court has the full power to afford complete relief for such denial, and pointed out the manner in which this could be accomplished. But the effect of petitioners' final argument is to urge that they were entitled to relief over and

above that required to make them whole for the failure to accord them the claimed rights for the one-year period of their duration.

At the time the District Court dismissed these cases, petitioners' contract rights in connection with their employment were precisely the same as they would have been had they been accorded the claimed statutory rights during the year following their reemployment, with the exception of any claim for damages that they might have had for the denial of such rights during the year. Thus, the only thing required to make them whole would be the satisfaction of that claim for damages. Oakley asserted no such claim. We have discussed the situation with respect to Haynes' claim for damages. Petitioners have urged strenuously the right of a court, in a judgment entered after the expiration of the one-year period, to award monetary damages for a denial of statutory rights within the year. We have stated our belief in the validity of that proposition. Clearly, then, if a court, in addition to satisfying claims for monetary damages suffered within the year, were to specifically enforce the alleged statutory rights for an additional year, it would be granting more relief than that required to make the veteran whole. It would, in effect, be extending the duration of the statutory rights to a period of two years, by granting damages for one year and specific performance during a second year.

It should also be pointed out that in any event, petitioners' final argument could have no application to the *Oakley* case. Oakley was in fact given a year's employment in the job to which he claimed he was entitled. Thus it cannot be said that there was a failure to restore him to the job which he claimed, which would prevent the statutory year from beginning. Even though he did not during that year have the seniority date that he claimed the statute entitled him to, he suffered no loss thereby.

**III. IRRESPECTIVE OF ANY QUESTION OF THE DURATION OF THE CLAIMED STATUTORY RIGHTS, THE DISMISSAL OF THE COMPLAINTS WAS PROPER BECAUSE THE SELECTIVE TRAINING AND SERVICE ACT DID NOT AT ANY TIME ENTITLE PETITIONERS TO THE POSITIONS AND SENIORITY STATUS WHICH THEY CLAIM.**

**A. The Judgment of a Lower Court Must Be Affirmed, Even Though Based Upon An Insufficient Ground, If Another Ground Exists Which Is Sufficient To Sustain It.**

Although it is our position that the judgments of the courts below were proper on the stated ground that these cases were moot because of the limited duration of statutory rights such as those asserted, it is our purpose to demonstrate, in this portion of our argument, that other sufficient and proper grounds existed which require affirmance of the decisions of the courts below. In substance, we propose to show that in neither case did the petitioner's complaint, considered alone, allege facts constituting a violation of any provision of the Selective Training and Service Act, and that the facts established by the record in the *Oakley* case affirmatively show a complete compliance with the Act's requirements.

This Court is not limited to passing upon the propriety of the grounds relied upon by the courts below, in determining whether petitioners' complaints were properly dismissed, but is free to affirm the judgments below on any other sufficient grounds. This rule has been authoritatively stated as follows:

"... A reviewing court may look into the record; and if the judgment below appears to be right for any reason, it is the duty of the reviewing court to affirm it. The judgment below will be affirmed.

even though based upon a ground insufficient to warrant it, if another ground exists which is sufficient, for it is a general rule that a decision of a trial court which is correct as a matter of law will be affirmed, even though the trial court arrived at its conclusion by an erroneous process of reasoning. A judgment will be affirmed if, in point of law, it should be affirmed. A reviewing court, in the absence of statutory authority, cannot, with propriety, reverse a decision which conforms to law and remand the case for further proceedings . . . . . " (3 Am. Jur., "Appeal and Error," p. 674.)

The principles thus stated have been recognized by this Court on a number of occasions. Thus, in the case of *LeTulle vs. Scofield*, 308 U. S. 415, the Court stated:

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him." (421-422; citing *Langnes vs. Green*, 282 U. S. 531, 535-537; *Helvering vs. Gowan*, 302 U. S. 238, 245; and *Ticonic Nat. Bank vs. Sprague*, 303 U. S. 406, 410, note 3, in support of the proposition urged by us.)

And in the case of *Ryerson vs. United States*, 312 U. S. 405, the Court said:

"As the Government has not sought *certiorari* it cannot attack the judgment below, but is free to sustain it upon any legal ground which will support it . . . . . " (408, citing the *LeTulle* case, *supra*.)

**B. The Selective Training and Service Act Did Not Entitle Petitioners to the Positions and Seniority Status Which They Claim.**

The issue involved in this portion of our discussion is one which has not previously been before this Court. It has, however, been the subject of a great deal of litigation, and the courts which have passed upon it have in most cases decided it adversely to the position taken by the petitioners in these cases. Unless the instant case be excepted, the Government, in its role of counsel for veterans asserting reemployment rights, has never to our knowledge sought a review by this Court of any of those decisions.

Nevertheless, the argument on behalf of petitioners is replete with statements which infer that there is not even any question as to the existence of the alleged rights which they seek to enforce, and that the question of the duration of the alleged statutory rights is the only conceivable obstacle to the relief which is sought. For this reason, as well as ~~because~~ we feel that the proposition advanced by us is sound, we have felt compelled to urge that this Court must sustain the decisions of the courts below on the basis of the non-existence of any such statutory rights as were asserted by petitioners, irrespective of the question of the duration of rights derived solely from the statute.

*1. Theory of the Complaints*

It is evident from an examination of the complaints in these cases that in neither instance does the petitioner claim that he was not reemployed in the same position which he left to enter the armed forces, or that he was not thereafter accorded all of the rights and incidents pertaining to such position. Instead, both petitioners claim that they were entitled, by virtue of the Selective Train-

ing and Service Act, to be given positions and seniority status entirely different from their former positions and the seniority status which they had formerly held in those positions (augmented by the period of their service in the armed forces).

Thus, it appears that when he entered the armed forces, Oakley left a position as a machinist in the employ of respondent L. & N. at Loyall, Kentucky, with employment in that position dating from 1943. In his complaint he asserts the right to be restored to a position as a machinist at Corbin, Kentucky, with seniority at that point dating from July 1, 1945.

Haynes alleges that he left a position as a machinist helper in the employ of respondent C. N. O. & T. P. at Somerset, Kentucky, in which he had been employed from on or about July 6, 1940, to February 1, 1942, and that upon his return from the armed forces he was reemployed in the same position, but was entitled by the Act to be restored to a position as helper apprentice and given all pay increases that had been received by persons employed as helper apprentices since February 1, 1943.

Both complaints proceed upon the theory that the Selective Training and Service Act entitled the petitioners to be restored not to their former positions which they left to enter the armed forces, but to other and different positions which they say they would have obtained had they remained in the employ of respondents instead of entering the armed forces. Oakley states that he was entitled to be restored to the "seniority he would have had had he not served in the Armed Forces of the United States, and remained in the continuous employment of the defendant."

(O. R. 2.) Haynes says that "said employment of machinist helper was not the employment to which he was entitled had he been given the seniority that he would have

had, had he remained in the employment of the company during the period of his service in the Armed Forces." (H. R. 2.)

Implicit in the theory of the complaints in these cases is the assumption that in determining what positions and seniority status must be accorded to returning veterans, they must be considered as having been working "*on the job*," in the active service of their employer, during the period of their military service. That this proposition constitutes the basis for petitioners' claims to the employment status and seniority which they seek here is stated time and again in petitioners' brief. Thus, at page 9 of their brief, the right here asserted is described as follows:

" . . . . the right, under Section 8 of the Selective Service Act of 1940, to have time in the military service credited as time *on the job*. . . . " (Emphasis supplied.)

\* Similar statements appear throughout petitioners' brief. The following are illustrative:

" . . . . They seek . . . to have their period of military service treated as time *on the job*. . . . " (Page 12.)

" . . . . the statutory protection requiring the period of military service to be counted as time *on the job*. . . . " (Page 15.)

" Thus the veteran's right to be restored to his job without loss of seniority assures him that he will be treated the same as similarly situated employees who remained *on the job*. " (P. 19.)

" . . . . the plain mandate of the statute that military service must be treated as the equivalent of time *on the job*. . . . " (Page 33.)

It is our position that the returning veteran is not required to be treated as if, during his absence in military service, he had in fact remained "*on the job*," in the active

service of his employer. We contend rather that the Selective Training and Service Act only requires that the veteran be treated as if he had been on furlough or leave of absence from his employment during the period of his military service. And where, as in these cases, there is no claim that the veteran would be entitled to the position and seniority status sought if he be considered as having been on furlough or leave of absence, the claim to such position and seniority status is not sustained, under the Selective Training and Service Act, by the assertion that he could or would have achieved the position and status had he been "on the job."

This Court has not previously had occasion to consider the question thus presented. In all of the previous cases involving disputes as to the position and seniority status to which a returning veteran was entitled, it has been completely immaterial whether he was considered as having been on furlough or leave of absence, or as having been on the job. In the cases of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, *Trailmobile Co. vs. Whirls*, *supra*, and *Aeronautical Industrial Dist. Lodge 727 vs. Campbell*, *supra*, it was unnecessary to draw this distinction for purposes of the Court's decision. But none of those cases involved a claim to a different position from that which the veteran left to enter the armed forces. Where such a claim is advanced, the distinction becomes vital.

That there is a distinction between the situation of an employee on "furlough or leave of absence" and the situation of one who is at work or "on the job," has been definitely recognized by this Court. Thus, in its opinion in the *Fishgold* case, *supra*, the court described a "furlough" and a "leave of absence" as constituting "types of cessation of work," and said that each constituted "a form of layoff." (328 U. S., 287.) Describing these terms further the Court said:

"An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be *restored to work* under specified conditions. Thus, when Congress decided to cover the contingency of a lay-off it used apt words to describe it." (328 U. S. 287; emphasis supplied.)

The concept of being at work on the job is, we submit, diametrically opposed to that of a cessation of work or a layoff.

## 2. *The language of the statute fails to support petitioner's claims*

Although petitioners predicate their actions upon the Selective Training and Service Act, they have not specified any particular provision of the Act which would confer upon them the rights which they seek to enforce.

The Act requires that in the case of a veteran who left a position, other than a temporary position, in the employ of a private employer, "such employer shall restore such person *to such position* or to a position of like seniority, status and pay." (Sec. 8 (b) (B); emphasis supplied.)<sup>7</sup>

But petitioners claim that when Congress said the veteran must be restored to his former position that is not what it meant; that it intended rather, that the veteran must be restored *not* to his former position, but to a different position which he could or would have obtained, or to which he would have been promoted, if he had remained on the job instead of entering the armed forces. We do not agree that the quoted portion of the Act is subject to an interpretation which is so much at variance with the actual language used by Congress. On the contrary, subsequent

<sup>7</sup> In quoting the "pertinent portions of Section 8" petitioners fail to include that portion of the phrase quoted here which is preceded by the conjunction "or." (Petitioners' Brief, p. 17.)

portions of the Act contain language which, in our opinion, directly precludes any such interpretation.

Having set up the requirement that returning veterans must be restored to their former positions, Congress then went on to define precisely the status and rights of persons so restored. In so doing it provided in Section 8 (c) of the Act, that:

*“Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces.”*

We can scarcely conceive of any language by which Congress could more definitely have rejected the contentions of petitioners.

There is no suggestion that the petitioners in these cases have not been treated as if they had been on furlough or leave of absence, and it is apparent that it is that treatment of which they complain. They say they should be treated in precisely the opposite manner, and given the positions and seniority which they would have obtained had they remained at work, on the job, instead of entering the armed forces. In other words, they seek to have the Act interpreted as having a meaning exactly opposite to what it expressly and unambiguously provides.

When it enacted the Selective Training and Service Act, Congress conferred and imposed novel and unprecedented rights and obligations upon employees and employers in private industry. It is indeed incredible that had it intended these rights and duties to go so far as petitioners claim, it would not have adopted express language to that end, rather than to attempt to achieve such a result by the use of words to which only an exactly opposite meaning may be ascribed.

3. *The legislative history of the statute indicates no Congressional intent to confer the rights claimed by petitioners.*

We have been unable to find anything in the legislative history of the Selective Training and Service Act which shows that Congress intended the result for which petitioners contend, or that the issue with which we are concerned was specifically considered prior to the enactment of the statute. In fact an examination of the legislative history reveals an almost total lack of discussion of reemployment rights, both in the committee hearings and on the floor of Congress. What little mention there was of the reemployment provisions was largely of an "inconclusive character," as this Court observed in *Trailmobile Co. vs. Whirls, supra*. (331 U. S. 61.)

Very little of the discussion of the legislative history contained in petitioners' brief has any bearing on the issues involved in these cases. However, the references which appear at page 25 of petitioners' brief if anything tend to refute rather than support their contentions here. If there is anything in the amendment to Section 8 (c) set forth by petitioners, or in Chairman May's statement that "we put them on furlough during the time they are in the service," which lends support to petitioners' claims in these cases, we fail to discern it; for they are here contending that Congress did not intend that they should be considered as having been on furlough or leave of absence, during the period of their military service, but rather that they should be considered as having been at work, on the job, during the period of their absence.

4. *The interpretation of the statute required to support petitioners' claims has been rejected by sound judicial authority.*

As we have indicated, the question of whether the "furlough or leave of absence" test, or the "on the job" test, should be applied to determine the employment status and seniority rights of a returning veteran has not been specifically passed upon by this Court. It has, however, been litigated on numerous occasions, and in almost every instance the court's decision has been that the furlough or leave of absence test is the one to be applied. A number of the United States Courts of Appeals have so held, and we shall refer first to some of these decisions.

The case of *Trischler vs. Universal Potteries, Inc.*, 171 F. (2d) 707, decided December 14, 1948, by the Court of Appeals for the Sixth Circuit, involved claims based on the same theory as those of petitioners here, and the factual situation presented is strikingly familiar to that in the *Haynes* case. In that case, one of the plaintiffs had been an apprentice when he entered the armed forces, and claimed employment as a journeyman upon his return. The remaining plaintiffs, who had not yet obtained apprenticeships at the time of their induction, claimed the right to displace individuals who, during their absence in military service, had received apprenticeships which plaintiffs would have been entitled to receive by virtue of their seniority had they not been absent. (For detailed facts, see District Court opinion, 78 F. Supp. 609.) In affirming the District Court decision denying these claims, the Court of Appeals applied the furlough or leave of absence test, ruling that the veterans had failed to establish that upon being re-employed, they had not been considered as having been on furlough or leave of absence during the period of their military service.

In the case of *Spearmon vs. Thompson*, 167 F. (2d) 626, the Court of Appeals for the Eighth Circuit denied the claim of one of the plaintiffs, Delozier, to be reemployed in a mechanic's position to which he would have been upgraded, from his former position as helper, had he remained on the job instead of entering the armed forces. Delozier's claim was predicated upon precisely the same theory as those of the petitioners in the instant case. In denying it, the Court of Appeals stated as follows:

" . . . Although it is stipulated that had he remained in the position of helper until November 2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under the Selective Training and Service Act have not been fully accorded to him." (167 F. (2d), 631-632.)

It is clear that in the *Spearmon* case, the court held that the Act did not require Delozier to be given the promotion that he admittedly would have gotten had he remained on the job instead of entering the armed forces. Delozier's petition for a writ of certiorari was denied by this Court on December 6, 1948. (*Delozier vs. Thompson*, No. 359, October Term, 1948; 93 L. Ed. (Adv.) 126.)

Among other cases applying the furlough or leave of absence test are those in which the courts have held that the question of whether a reemployed veteran is eligible for vacation pay during the first year after his return depends not on whether he would have been so eligible had he remained at work instead of entering the armed forces, but

on whether he would have been eligible had he been on furlough or leave of absence during the period of his military service. Among these cases are two decisions by the Court of Appeals for the Second Circuit, *Dwyer vs. Crosby Co.*, 167 F. (2d) 567, and *Siaskiewicz vs. General Electric Co.*, 166 F. (2d) 463, and a very recent one by the Court of Appeals for the Third Circuit, *Dougherty vs. General Motors Corp.*, No. 9785, August 8, 1949, unofficially reported at 24 L. R. R. M. 2369.<sup>8</sup>

And in a case involving a similar question, *Seattle Star vs. Randolph*, 168 F. (2d) 274, the Court of Appeals for the Ninth Circuit held that time spent in the armed forces was not to be considered as time worked in private employment for the purpose of computing a reemployed veteran's severance pay. In so holding, the court said:

"It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with Section 8 (c) of the Selective Service and Training Act and is against public policy. Such a contention is diametrically opposed to the plain reading of Section 8 (c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. *Feore vs. North Shore Bus Co., Inc.*, 2 Cir., 161 F. 2d 552." (168 F. (2d). 276.)

The case of *Raulins vs. Memphis Union Station Co.*, 168 F. (2d) 466 (C. A. 6th. 1948), affirmed the dismissal of claims of electrician helpers to positions as journeymen electricians which they asserted they would have obtained had they remained at work instead of entering the armed

<sup>8</sup> Reference is to Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D. C.

forces. The following language from the court's opinion is particularly relevant to the issue under discussion:

"If the appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. Section B of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training. Rule 43 of the Collective Bargaining Agreement, dealing with leave of absence, provided for such a leave for a period not exceeding 30 days with privileges of renewal, but made no provision that an employee who has been absent upon leave may upon returning exercise those rights that would have been available to him if he had not been absent." (Emphasis supplied.)

Also in-point is the case of *Special Service Co. vs. Delaney*, 172 F. (2d) 16 (C. A. 5th, 1949), where the court said:

" . . . although the returning service man is entitled to the same job he had on leaving for military service, he is not entitled to promotions received by his successor during his absence. . . . "

" . . . The law is clear that under the statute, 50 U. S. C. A. Appendix, Sec. 308, the employee is entitled to his old job or an equivalent job, but is not entitled to advance to a higher classification, in the absence of some particular agreement of employment, during his service with the Armed Forces. . . . " (172 F. (2d), 19.)

As we stated at the outset, this Court has not as yet had the issue under discussion before it for decision. But the petitioners apparently rely, as did the veterans in all of the cases which we have cited, upon certain language in the Court's opinion in the case of *Fishgold vs. Sullivan Drydock & Repair Corp.*, *supra*, to support their claim that

the "on the job" test must control their rights. (Petitioners' Brief, pp. 30, 34.) We believe, however, that insofar as it relates to the facts of these cases, the *Fishgold* case supports our position.

In this connection, we think that the following language from the opinion of the Court of Appeals in the *Fishgold* case serves to point up the statements in this Court's opinion which are pertinent to this discussion:

" . . . The phrase, 'like seniority' means the 'same seniority' as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the last position. But if that be true, there can be no implication that, if the original be not lost, but be still available, the veteran shall be restored to it with a gain in priority; for that would pre-suppose that Congress did not intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of Section 8 (b) not only did not grant any step up in seniority, but positively denied any.

"Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work,

does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position 'shall be considered,' Congress added that he should be 'restored without loss of seniority.' Had the purpose been, not only to insure the veteran that he should not lose any more steps upon the ladder than if he had been on leave, but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, 'without loss of seniority.' They have no such express meaning, and their implications are directly the opposite; for they disclose a concern against his possible demotion inconsistent with any implied belief in his promotion. . . ." (Emphasis supplied.) (*Fishgold vs. Sullivan Drydock & Repair Corp.*, 154 F. (2d) 785, 788.)

In the light of the above quoted statement, the portion of this Court's opinion referring to the opinion of the Court of Appeals would seem to refute any contention that the "on the job" test controls. Thus, this Court said:

" . . . We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more." (328 U. S., 286.)

It is true that in the *Fishgold* case the Court said that the returning veteran " . . . does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. . . . He acquires not only the same seniority he had; his service in

the armed forces is counted as service in the plant so that he does not lose ground by reason of his absence. . . . ” (Emphasis supplied.) But the only question before the Court was that of seniority, and as we understand these statements, they were made with reference only to the *amount of seniority*, or *number of years, months and days*, with which the veteran must be credited upon his return. There is nothing in the facts or issues of the *Fishgold* case to indicate that anything more was intended, or that the Court meant that service in the armed forces must be counted as service in the plant for any other purpose than that of computing the amount of seniority held by the veteran upon his re-employment.<sup>9</sup>

Although, again, this immediate question was not involved, we believe that this Court's opinion in *Aeronautical Industrial Dist. Lodge 727 vs. Campbell, supra*, goes far to indicate that the furlough or leave of absence test is controlling. There the Court said:

“ . . . . the Act gives him (the veteran) the status of one who has been ‘on furlough or leave of absence’ but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is ‘on furlough,’ but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275.” (Portion in parentheses not a part of quotation.)

Insofar as we have been able to ascertain, the case of *Conner vs. Pennsylvania Railroad*, 24 L. R. R. M. 2362

<sup>9</sup> For an excellent discussion disposing of contentions similar to petitioners' with respect to the language of the *Fishgold* opinion, see *Woods vs. Glen Alden Coal Co.*, 73 F. Supp. 871, 874-875.

(C. A. D. C., August 1, 1949), cited by petitioners, is the only case which is clearly opposed to the numerous authorities which we have cited in support of our position on the issue under discussion. The case of *Morris vs. Chesapeake & Ohio Ry. Co.*, 171 F. (2d) 579, in which this Court denied certiorari (October Term, 1949, No. 638, cert. den. May 2, 1949; rehearing den. June 6, 1949), can scarcely be said to support petitioners' position with respect to the "on the job" test in view of the position taken in the brief filed with this Court by the respondent in opposition to the petition for certiorari. There, respondent argued to the effect that the rights asserted by him were simply those accorded by the contractual seniority system to non-veteran employees returning from leave of absence. (See pages 26-27, 30-31, 32-35, of brief for respondent Morris.) And the case of *Mentzel vs. Diamond*, 167 F. (2d) 299 (C. A. 3rd), cited by petitioners, can scarcely be considered as authority for their position in view of the subsequent decision by the same Court of Appeals in the case of *Dougherty vs. General Motors Corp.*, *supra*.

5. The record in the Oakley case affirmatively shows that the petitioner was accorded all rights guaranteed by the statute.

We have pointed out that in *neither* of these cases does the petitioner's complaint, either on the basis of the facts alleged or the theory underlying the action, establish the existence of a statutory right, even within the one-year period, to the position and seniority status claimed. In addition, we will show in this concluding portion of our memorandum that it affirmatively appears that petitioner Oakley did in fact receive every right to which the Act entitled him.

It is apparent from the record in the *Oakley* case that certain facts appear by answers, admissions and support-

ing affidavit which would have required the District Court to sustain the motion for summary judgment (O. R. 12) had the motion to dismiss the complaint not been sustained. It is our position that even though the courts below arrived at their decisions on the basis of the motion to dismiss, this Court is empowered to consider the entire record and affirm the decisions below if the same result would have been achieved by a proper granting of the motion for summary judgment.

The position which Oakley left to enter the armed forces was that of a machinist at the Loyall, Kentucky, shops of respondent L. & N. As an incident of that position he had, by virtue of a collective bargaining agreement between his employer and respondent System Federation No. 91, certain seniority rights which guaranteed him specified preferences over other machinists whose seniority date, or date of original employment at Loyall, was subsequent to his. His seniority date at Loyall was July 6, 1943. The agreement confined seniority rights to the point on the railroad where the individual was employed. (O. R. 6, 11—Adm. No. 23.)

Upon his return from the armed forces and application for reemployment, Oakley was restored to the same position as a machinist at Loyall, and accorded his same seniority date of July 6, 1943. (O. R. 13, Affidavit of H. Feather; 5, 10—Adm. 15 and 18.) However, by the operation of the contractual seniority system there was no work available for him at Loyall (O. R. 5, 10—Adm. No. 16), so that his status was that of a furloughed employee at that point. Under the ruling of this Court in the *Fishgold* case, *supra*, he was thus restored to his former "position" within the meaning of the Selective Training and Service Act. And he was restored to it without loss of seniority because, under the seniority system in effect, the restoration of his old seniority date in effect gave him

full seniority credit for the period of his absence in military service.

Among the incidents of the position which Oakley left and to which he was restored was the right, when furloughed from that position, to be given preference if he wished to transfer to another point on the railroad where additional men were needed. (O. R. 6, 11—Adm. No. 23.) Oakley applied for and received a transfer to a position as machinist at Corbin. In accordance with the provisions of the agreement, he was given a seniority date at Corbin as of July 18, 1946, the date on which he commenced work there (O. R. 5, 10—Adm. No. 12 and 13), and at the same time retained the right to elect whether he would return to Loyall, still keeping his furloughed status and his old seniority date at that point, should he be recalled to work in accordance with his seniority there. (O. R. 5, 10—Adm. No. 18.)

The treatment thus accorded Oakley upon his return and reemployment was precisely the same as that to which the contract would have entitled him had he been on leave of absence from the employ of respondent L. & N. during the period of his military service. The seniority system prohibited any employee from being given retroactive seniority antedating the date of commencing work at any point. (O. R. 6, 11—Adm. No. 23.)

There is no suggestion anywhere in the record that Oakley's status or seniority as set forth above was changed in any respect from the date of his reemployment to the date of the District Court's judgment dismissing his complaint, or thereafter, for that matter. If any such change had occurred, it would have been incumbent upon Oakley to bring it to the attention of the court, particularly in view of the pending motion for summary judgment. It is therefore fair to assert that Oakley has not been discharged or demoted from the status and seniority to which he was restored.

It is clear from the above recital of the facts disclosed by the entire record that Oakley was accorded every right guaranteed him by Section 8 of the Selective Training and Service Act. Paraphrasing the requirements of Section 8, Oakley was restored to the position which he left to enter the armed forces; was, upon being so restored, considered as having been on leave of absence during the period of his military service; was so restored without loss of seniority; was accorded all benefits offered by his employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time he entered the armed forces; and was not discharged from such position within one year after such restoration.

We therefore submit that the motion of respondent L. & N. for summary judgment was well taken, and would properly have been granted by the District Court had it not sustained the motion to dismiss.

### CONCLUSION

We have shown that in these cases petitioners are asserting claims which have no contractual basis, and which, if they were valid, would necessarily be purely statutory in nature. We have further demonstrated that any purely statutory rights guaranteed by the statute upon which these claims are based, the Selective Training and Service Act, exist for one year only, and may not be enforced beyond the period of their duration. Therefore, we concluded that the courts below ruled correctly in refusing to grant relief for a failure to accord such rights to petitioners after their expiration.

We have also pointed out that irrespective of any question of the duration of the rights asserted, such rights did not in fact exist, and that the decisions of the courts below should therefore be affirmed irrespective of the

grounds upon which they were predicated. In this connection we demonstrated that upon the basis of the facts alleged and the theory of petitioners' actions, neither complaint stated a cause of action for relief under the Selective Training and Service Act; and that the entire record in the *Oakley* case affirmatively established a full compliance with the requirements of the Act and hence would require the granting of the motion for summary judgment filed therein.

It is therefore respectfully submitted that the decision of the Court of Appeals in both of these cases should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon all parties of record herein on the 8th day of October, 1949, by mailing copies thereof to the Solicitor General of the United States, counsel for petitioners John Walter Oakley, Jr., and John S. Haynes; Mr. Carl M. Jacobs, Mr. Cornelius J. Petzhold, and Mr. W. S. Macgill, counsel for respondent Cincinnati, New Orleans and Texas-Pacific Railway Company (Southern Railway System); and Mr. C. S. Landrum and Mr. H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

CLARENCE M. MULHOLLAND.

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**IN THE  
Supreme Court of the United States**

**October Term, 1949.**

**No. 28.**

**JOHN WALTER OAKLEY, JR.,** . . . . **Petitioner,**

**VERSUS**

**LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY,** . . . . **Respondent.**

**BRIEF FOR RESPONDENT.**

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IN THE  
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JOHN WALTER OAKLEY, JR.,                      -                      -                      *Petitioner,*

v.

LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY,                      -                      -                      -                      -                      *Respondent.*

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**BRIEF FOR RESPONDENT.**

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**STATEMENT OF THE CASE.**

This case presents the questions of seniority rights of a re-employed veteran, and of the duration of the protection of such rights, under the provisions of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. §301, *et seq.*). Respondent believes that both questions are fully answered in the opinions of this Court in *Fishgold v. Sullivan Drydock & Repair Corporation, et al.*, 328 U. S. 275; *Trailmobile Company, et al., v. Whirls*, 331 U. S. 40, and *Aeronau-*

*tical Industrial District Lodge 727 v. Campbell, et al.*, 337 U. S. 521. The only question before the District Court when it dismissed the action as moot (R. 18) was whether petitioner's seniority at Corbin, Ky., should date from July 18, 1946, the day he first worked there, or July 1, 1945, the day he might have started to work there had he not, at that time, been in the armed forces. Petitioner had not worked at Corbin prior to his service in the armed forces, and had no seniority at Corbin when he entered the armed forces. The ground upon which the action was dismissed injects the further question of duration of the protection afforded to seniority rights by the Selective Training and Service Act of 1940.

When the action was dismissed by the District Court, that Court had before it, in addition to the complaint (R. 1) and the answers of respondent (R. 8) and the Union (R. 16), respondent's request for admissions (R. 4-7), petitioner's response to that request (R. 10-11) admitting all of the facts set out in the request except those denied for lack of information, and the uncontroverted affidavit of H. Feather (R. 12-13), filed in support of respondent's motion for summary judgment (R. 12), establishing the facts which had been denied by petitioner for lack of information.<sup>1</sup>

The facts admitted by all of the parties established, without contradiction, that when petitioner entered

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<sup>1</sup>Petitioner, in his brief, asserts that the factual allegations of the complaints must be taken as true. Surely admissions of facts under rules 26 and 36, Federal Rules of Civil Procedure, which were before the District Court and considered by it in dismissing the action as moot are appropriate facts for consideration on appeal. The fact that the question in issue has become moot may be brought to the Court's attention even by suggestion. *Eisler v. United States*, 338 U. S. 189.

military service on May 7, 1944, he was working as a machinist at Loyall, Ky., and that his seniority, which dated from July 6, 1943, was confined to that point; that upon his return from military service he was given his old position at Loyall with seniority at that point from July 6, 1943 (R. 5, 13, admissions 14 and 15, and uncontroverted affidavit of H. Feather); that during his absence in military service the respondent's circumstances had so changed as to make it impossible and unreasonable to give petitioner work at Loyall (R. 5, admission 16); that upon his return from military service, because of reduction of working force at Loyall, he was placed on furlough at that point, to be called back to work at that point in accordance with his seniority at that point (R. 5, admission 18); that, being on furlough at Loyall, he applied "for a job as machinist at Corbin" (R. 4, admission 10), was given that job at Corbin on the day he applied for it and was given seniority at Corbin from that day (R. 4, 5, admissions 10, 12, 13); that the seniority given to him was in strict accordance with Rule 28 of the collective agreement governing his employment (R. 6, admission 23); that had petitioner not been in military service on July 1, 1945, he would have been cut off and placed on furlough at Loyall on that day (R. 5, admission 17), and under the collective agreement could have applied, at any time after July 1, 1945, while on furlough at Loyall, for employment at Corbin and might have been given preference to transfer to that point, or to any other point on respondent's line of railroad, provided machinists were needed at Corbin, or such other point at which he evidenced that he desired employment (R.

6, Rule 26, admission 23); and upon his transfer to Corbin, or any other point, his seniority at Corbin, or such other point to which he transferred, would have dated from the day he first worked at that point (R. 6, Rule 28, admission 23).

This action is not one for a declaration of rights. It is one which is based upon, and in which the jurisdiction of the District Court is invoked under, the provisions of the Selective Training and Service Act of 1940, as amended, to require respondent to give petitioner seniority dating at Corbin from July 1, 1945, because of his employment at Loyall, Ky., and the provisions of the Act, it being claimed that had he not been in military service he might have applied on July 1, 1945, for employment at Corbin and could have been transferred to Corbin on that day. Under the collective agreement, non-veterans on furlough because of force reduction desiring transfer to Corbin, or to any other point, were not entitled to seniority at Corbin, or at such other point, until they actually started working at Corbin, or such other point (R. 6, admission 23). Upon the pleadings, admissions and uncontroverted affidavit of H. Feather, respondent filed its motion for a summary judgment in its favor (R. 12). While that motion was pending, this case was assigned for argument upon the question whether, under the opinion of this Court in the *Trailmobile* case, *supra*, the cause had been rendered moot by the expiration of the statutory year to which Section 8(c) of the Selective Training and Service Act limited petitioner's right to any special or preferential

standing in respect to restored seniority (R. 18). Upon hearing, the District Court sustained the Union's motion to dismiss the cause on the ground that the question presented had become moot (R. 18). The Court of Appeals for the Sixth Circuit affirmed the District Court on the ground that the statutory period had elapsed, and that under the provisions of the Selective Training and Service Act petitioner was not, after that period, entitled to the preferred seniority standing that he claimed (R. 21-23).

### **SUMMARY OF ARGUMENT.**

Respondent contends that the judgment of the District Court, affirmed by the Court of Appeals, is right, and should be affirmed by this Court, for the following reasons:

1. Petitioner was fully restored to the position he left at the time he was inducted into the military service, plus cumulated seniority, as required by the Selective Training and Service Act of 1940, and is not entitled to the seniority at Corbin, as claimed by him, under the provisions of that Act.

2. The rights or benefits conferred upon petitioner by the Selective Training and Service Act terminated with the expiration of the statutory year.

## ARGUMENT.

1. **Petitioner Was Fully Restored to the Position He Left at the Time He Was Inducted Into the Military Service, Plus Cumulated Seniority, as Required by the Selective Training and Service Act of 1940, and Is Not Entitled to the Seniority at Corbin, as Claimed by Him, Under the Provisions of That Act.**

Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 890, 58 Stat. 798, 50 U. S. C., Appendix, Section 308, so far as the facts in this case are concerned, provides that a veteran shall be restored to the position he left when he entered military service, without loss of seniority, unless the employer's circumstances have so changed as to make it impossible or unreasonable to restore him; that the veteran shall be considered as having been on furlough or leave of absence during the time he was in military service; and that he shall not be discharged from the old position to which he is restored without cause, within one year after restoration.

The position to which the veteran is required to be restored is the position which he left plus cumulated seniority. He is entitled to his old position even though at the time of his application for reemployment there is no work available. If there is no work available, he is entitled to be recalled to work in accordance with his seniority. *Fishgold v. Sullivan Drydock & Repair Corp.*, *supra*. No new system of seniority was created by the Selective Training and Service Act. *Aeronautical Industrial Dist. Lodge 727 v. Campbell*,

*et al.* The Act recognized the existence of seniority systems and seniority rights, and the veteran was given protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for the period of one year. *Fishgold v. Sullivan Drydock & Repair Corp., supra.* Railroading is a unionized industry. Seniority and seniority rights in the railroad industry derive their scope and significance from collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727 v. Campbell, et al.; Trailmobile Co. v. Whirls; Fishgold v. Sullivan Drydock & Repair Corp., supra.* In the *Aeronautical Industrial* case, it is said (337 U. S., p. 526):

"We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."

When petitioner entered military service he was employed as a machinist at Loyall, Ky. Under the collective bargaining agreement governing his employment his seniority was confined to Loyall. The collective bargaining agreement provides for "point" seniority, *i. e.*, seniority acquired at the point where the employee works. His seniority at Loyall dated from June 6, 1943, the day he started working at Loyall (R. 4, 5, 6, admissions 1, 15, 23). Upon his return from military service he was restored to his old position with seniority at Loyall from June 6, 1943 (R. 5, admission 18). That was a full restoration without loss of seniority as re-

quired by Section 8(c) of the Selective Training and Service Act. That gave to him the seniority he accumulated while he was in military service. That gave to him the same position that he had when he entered military service plus cumulated seniority, and not an inferior position as argued by petitioner. He was not penalized in his seniority but was given full credit for the time he was in military service. He was given the exact status of one who had been "on furlough or leave of absence" but uninterruptedly a member of the working force. That is what the Act required. *Aeronautical Industrial Dist. Lodge 727 v. Campbell, et al., supra.* The Act protected petitioner from discharge from that restored position at Loyall for one year from the date of his re-employment after his return from military service. After the expiration of that year, petitioner's continued employment depended on the collective bargaining agreement under which he worked, i. e., the contract of employment. *Spearmon, et al. v. Thompson, et al.*, 8 Cir., 167 F. 2d 626; cer. denied *Thompson, et al. v. Spearmon, et al.*, 335 U. S. 822, and *Delozier v. Thompson, et al.*, 335 U. S. 886; opinion clarified, 8 Cir., 173 F. 2d 452; *Trailmobile Co. v. Whirls, supra.* His employment was at all times a subject of collective bargaining so far as his seniority was concerned, except that he had to be restored to his former position without loss of seniority and not discharged (or demoted) without cause for one year. *Aeronautical Industrial Dist. Lodge 727 v. Campbell, et al.*

The seniority at Corbin, Ky., which petitioner commenced to accumulate by starting to work at that point

on his return from military service, was from new employment which he secured by reason of the fact that he was on furlough at Loyall. On July 1, 1945, three machinists at Loyall with more seniority than petitioner were laid off (R. 4, admission 6). They were Pearl M. Shell, with seniority from August 19, 1926; Robert S. Kallem, with seniority from October 4, 1926; and Glen B. Wolfe with seniority from May 13, 1929 (R. 4, admissions 2, 3, 4). (Petitioner's seniority at Loyall was from July 6, 1943.) Shell, Kallem and Wolfe were laid off because of reduction of force at Loyall due to the fact that there was not sufficient work for them at that point (R. 4, admission 6). On the day these three men were laid off and placed on furlough, had petitioner been working at Loyall instead of being on furlough in military service, he would likewise have been laid off and placed on furlough (R. 5, admission 17). The admitted facts establish that the Loyall shops were not transferred to Corbin, and that the placing on furlough of the men senior to petitioner was not due to transfer of the Loyall shops to Corbin, as alleged in the complaint. Machinists senior to petitioner, Shell, Kallem and Wolfe, were employed at Loyall after July 1, 1945 (R. 4, admissions 8, 9). The junior machinist remaining at work at Loyall was Elijah J. Saylor, with seniority from June 27, 1926 (R. 4, admission 5). Shortly before petitioner returned from military service, Saylor was granted a leave of absence on account of serious illness, and Pearl M. Shell, the senior furloughed machinist at Loyall, was recalled to work. Thereafter the machinist work of respondent at Loyall was done by Pearl

M. Shell and the machinists senior to Shell (R. 4, admission 8). When petitioner returned from military service, two of those senior machinists, Robert Kallem and Glen B. Wolfe, who were laid off in reduction of force on July 1, 1945, were still on furlough, and one senior machinist, Elijah J. Saylor, was on leave of absence due to serious illness (R. 4, admissions 7, 8, 9). None of the machinists, Shell, Kallem and Wolfe, who were cut off and placed on furlough at Loyall on July 1, 1945, transferred to Corbin. None of them now has, nor at any time had, seniority at Corbin (R. 5, admission 21). The statement of the Court of Appeals (R. 22) that the machinists from Loyall "were given seniority" at Corbin "as of the date of their transfer" is not supported by the record. Nor is there anything in the record to support the statement of the Court of Appeals (R. 22) that petitioner is claiming that under the Selective Training and Service Act of 1940, he was entitled to seniority as of July 1, 1945, "the date on which the other employes of the company at Loyall transferred to the shops at Corbin." *When this action was dismissed by the District Court, petitioner had his cumulated seniority at Loyall; likewise all of the other machinists who had been laid off by reason of reduction of working force at Loyall and placed on furlough had their seniority at that point. One had been called back to work in accordance with his seniority, and two of them senior to petitioner were still on furlough. Petitioner, too, was then on furlough from Loyall, subject to being called back when needed* (R. 5, admission 18). Petitioner based his right to a job as machinist at Corbin and seniority at that point as of

July 1, 1945, solely upon the fact that had he not been in military service he would have been cut off and placed on furlough at Loyall on July 1, 1945, and that he could have made application on that date for a job as machinist at Corbin and could have accepted the job at Corbin. On July 18, 1946, he made that application (R. 4, 5, admission 10) for "a job as machinist at Corbin," in accordance with paragraph (b) of Rule 26 of the collective agreement, and was given that job the day he applied for it. Rule 26 (R. 6, admission 23) reads as follows:

**"Rule 26. Transfer of Laid-Off Employees.**

"26(a) While forces are reduced, if men are needed at other points, furloughed men will be given preference to transfer, with privilege of returning to home station when force is increased, such transfer to be made without expense to the company, seniority to govern.

"26(b) An employee laid off in force reduction desiring to secure employment under this rule shall notify his foreman in writing and furnish his craft General Chairman copy of the letter."

Petitioner's application for "job as machinist at Corbin" was received by the Railroad on July 18, 1946 (R. 4, admission 10). He was immediately employed at Corbin and actually started working there on that day. He was given seniority at Corbin beginning that day, July 18, 1946 (R. 5, admissions 12, 13). That was in accordance with the collective agreement. It provides for "point" seniority and that such seniority "will begin from the date and time the employe starts

5

to work" (R. 6, admission 23). The work and seniority at Corbin were entirely independent of the work and seniority at Loyall. The machinists at Corbin were not drawn, nor did they necessarily come, from the furloughed machinists at Loyall or at any other point. Seniority could only be accumulated at Corbin by working at that point.

Between July 1, 1945, the day the machinists senior to petitioner were cut off and placed on furlough at Loyall (also the day that petitioner would have been cut off and placed on furlough had he not been in the armed forces), and July 18, 1946, the day that petitioner actually started working at Corbin, five machinists were employed at Corbin. The seniority of each of those men dates from the day each started working at Corbin. They were Vernon C. Vandermark, with seniority from November 26, 1945; N. M. Jenkins, with seniority from April 7, 1946; L. C. Whitus, with seniority from June 5, 1946; L. S. Stansberry, with seniority from June 17, 1946; and G. G. Harp, with seniority from June 26, 1946. When they started working at Corbin, petitioner had no seniority at Corbin (R. 5, admission 21). He was then on furlough at Loyall because of his services in the armed forces.

Petitioner and the five men employed at Corbin were all given seniority at that point beginning from the date and time each man started working there. To give petitioner seniority at Corbin as of a day prior to the day he started working there, would be to give him a preferred standing over the other men. The Selec-

tive Training and Service Act did not give petitioner or any other veteran that preferred standing. *Fishgold v. Sullivan Drydock & Repair Corp., supra.*

It is not denied that petitioner was restored to his old "position" with cumulated seniority at Loyall. That restoration gave him the seniority he had at the time he entered military service, plus the seniority he had accumulated while in military service. It is admitted that during his absence there had been such a change in circumstances that it was impossible to give him work at Loyall. To give him work at Loyall would have been unreasonable and would have given him a preference over senior machinists (R. 5, admission 16). Under the admitted facts he was not entitled to work at Loyall so long as senior machinists were laid off at that point. In the *Fishgold* case, *supra*, at page 287, this Court said:

"The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his 'position' when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old 'position' or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's 'circumstances' have so changed as to make it impossible or un-

reasonable' to restore him. §8(b)(B). He is entitled to be recalled to work in accordance with his seniority. His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

The status of petitioner, after being restored to the position he left with cumulative seniority, was that of a machinist laid off because of reduction of force. When he was thus restored to the position he left with cumulated seniority, he was given full "protection within the framework of the seniority system" in effect on the Railroad.

Rule 26 of the collective agreement under which petitioner worked provided that while forces were reduced, if men were needed at other points, furloughed men would be given preference to transfer to points where men were needed. If a furloughed man desired to secure employment under that provision of the agreement he was required to notify his foreman in writing of his desire. That is what petitioner did when

he returned from military service. He now says that he would have made application for work at Corbin when he was first placed on furlough and that he would have accepted such work at Corbin. While there is a probability that petitioner would have applied for work at Corbin when he was laid off at Loyall on July 1, 1945, yet such an assignment was not a matter of absolute right. It was conditioned first, upon men, in this case machinists, being needed at that point, and second, upon petitioner notifying his foreman and General Chairman of his craft in writing of his desire to secure such work. *Cf. Raulins v. Memphis Union Station Co., et al.*, 6 Cir., 168 F. 2d 467; *Special Service Co. v. Delaney*, 5 Cir., 172 F. 2d 16; *Harvey, et al. v. Braniff International Airways, Inc.*, 5 Cir., 164 F. 2d 521; *Hewitt v. System Federation, et al.*, 7 Cir., 161 F. 2d 545. It is worthy of note that none of the other machinists laid off at Loyall July 1, 1945, all of whom were senior to petitioner, applied for work at Corbin. Under the agreement the mere fact that a man is laid off by force reduction at one point does not give him seniority rights at any other point. The laid-off man is not required to make application for work at another point at the time he is laid off. He may make such application at any time while laid off (R. 6, admission 23, Rule 26). The employment at the point or points at which laid-off men apply for work under the provisions of Rule 26 is separate and distinct from the employment at their old stations, with separate seniority rosters and entirely separate and distinct seniority rights. The men applying and being assigned to such work retain their old positions, with their old

seniority, and may return to their old or home stations when needed there. At any time while on furlough waiting to be called back when needed, they may secure employment at any other point where men are needed, if they so desire, but respondent cannot require the men to make application for such work. It is wholly voluntary on the part of the men. Their seniority at the point to which they transfer is controlled by Rule 28 of the collective agreement (R. 6, admission 23) which reads as follows:

**"Rule 28. Seniority.**

**"28(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.**

**"28(b) Seniority of employe in each craft covered by this agreement *shall be confined to the point employed* for those who perform work as per special rules of each craft in the various departments of the railroad as follows:**

**"Machinists \* \* \*." (Emphasis added.)**

Under that Rule it is clear that petitioner's seniority at Corbin dated from July 18, 1946, the day he first worked at that point after applying for work as machinist at that point. *To establish seniority at Corbin he had to start working at Corbin.* That is the way Chester C. Parrott, Vernon C. Vandermark, N. M. Jenkins, L. C. Whitus, L. S. Stansberry and G. G. Harp established their seniority at Corbin (R. 5, admission 21). Even though they may have transferred from some other point, they did not establish seniority

at Corbin until they started working there. Petitioner was not entitled, by reason of his absence in military service, to a step-up or gain in seniority or priority. He was given all of the rights to which he was entitled under both the Selective Training and Service Act and the collective bargaining agreement under which he worked. He was entitled to no more. *Fishgold v. Sullivan Drydock & Repair Corp., supra; Aeronautical Industrial Dist. Lodge 727 v. Campbell, supra.* To quote again from the Fishgold case, pp. 285, 286:

"As we have said these provisions [Secs. 8(b) and 8(c)] guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions [Secs. 8(b) and 8(c)] if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. \* \* \* No step-up or gain in priority can be fairly implied."

See also the *Trailmobile* case, *supra*, at p. 58, reaffirming this construction of the provisions of Section 8 of the Selective Training and Service Act.

From the facts before the District Court it was plain to that Court that petitioner had been fully restored to his former position, plus cumulated seniority, and that any claim of seniority at Corbin as of a date prior to the date he first worked at Corbin was a claim

of preferred standing or "super-seniority" which, if it ever existed, expired at the end of the statutory year. The District Court did not err in dismissing the cause. With the uncontroverted facts in the record establishing that petitioner was fully restored to his old position with cumulated seniority, the judgment of the District Court is correct and should be affirmed. *Helvering v. Gowran*, 302 U. S. 238.

**2. The Rights or Benefits Conferred Upon Petitioner by the Selective Training and Service Act Terminated With the Expiration of the Statutory Year.**

It is perfectly clear that petitioner's seniority rights before he entered the military service, and while on furlough in the military service, were derived from the collective bargaining agreement of September 1, 1943. *Aeronautical Industrial District Lodge No. 727 v. Campbell, et al.*, 337 U. S. 521. It is likewise perfectly clear that, under Rule 28 of that agreement, petitioner acquired no seniority at Corbin until he actually started to work at that point. Non-veterans working under that agreement could establish seniority at Corbin only by starting to work at that point. Therefore, to give petitioner a seniority status at Corbin prior to the time he started to work at that point would be to give him a preferred standing over non-veterans, which he is not entitled to under the agreement, and which, we insist, he is not entitled to under the law as announced in the *Fishgold* and *Trailmobile* cases, *supra*.

But if, notwithstanding the bargaining agreement, petitioner had been given seniority at Corbin as of July 1, 1945, the date he could have applied for work at that point except for the fact that he was on furlough in the military service, such seniority would have been an extraordinary statutory seniority or standing which terminated at the expiration of the statutory year. That year had expired at the time the judgment of the District Court was entered. As stated by this Court in the *Trailmobile Company* case, at page 59:

"But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over non-veteran employees, a preferred status which we think not only inharmonious with the basic Fishgold rationalization, but beyond the protection contemplated by Congress."

And at page 60:

"\* \* \* The only question here and the only one we decide is that §8(c), although giving the reemployed veteran a special statutory standing in relation to 'other rights,' as defined in the Fishgold case, during the statutory year, and creating to that extent a preference for him over non-veterans, did not extend that preference for a longer time.

\* \* \* \* \*

"We find it unnecessary therefore to pass upon petitioner's position in this case, namely, that all

protection afforded by virtue of §8(c) terminates with the ending of the specified year. *We hold only that so much of it ends then as would give the re-employed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.*" (Emphasis added.)

Here the only question is petitioner's seniority rights at Corbin and the duration of such rights under the Selective Training and Service Act. Nothing else was before the District Court when the action was dismissed. Unlike the *Haynes* case, No. 29, petitioner does not claim damages for loss incurred during the statutory year by reason of his not having been given the preferred standing he claims. Petitioner had been employed as a machinist, the position he left at the time he entered the military service, for more than one year after his restoration to his former position with cumulated seniority at Loyall. The question of his claimed extraordinary statutory seniority at Corbin from the date he could have applied for transfer to that point had become moot and was properly so treated by the District Court. Under the facts of petitioner's employment since his restoration, which facts were before the District Court, that Court could make no other finding than that petitioner's rights under the Selective Training and Service Act had come to an end. Any other finding would have been a finding on an abstract proposition, a decision which could not possibly affect the result of the only question in issue in this case. *Walling v. Shenandoah-Dives Mining Co.*, 10 Cir., 134 F. 2d 395. In *U. S. v. Hamburg-American*

*S. S. Co.*, 239 U. S. 466, this Court had before it a case in which, because of World War I and the applicable law, the only matter in controversy had become moot. In declining to pass upon the abstract proposition, this Court quoted with approval the following from *California v. San Pablo & T. R. Co.*, 149 U. S. 308:

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

After the expiration of one year from the date that petitioner was restored to his old position without loss of seniority, he not having been discharged or demoted during that one year, petitioner must look to his union for protection of his employment. His rights to employment and seniority after the expiration of the statutory one-year period are rights under the bargaining agreement (contract of employment) and not under the statute.

In *Spearmon, et al., v. Thompson, et al., supra*, the Circuit Court in its clarifying opinion, 173 F. 2d 452, at page 453, said:

"The statute protected them from discharge from their positions as mechanics for one year from the date of their re-employment upon their return from the service of their country. That year has long since passed. After its expiration, their continued employment as mechanics depends upon their contract of employment. If the same contract is in effect now, the seniority thereunder which appellants acquired by statute while in the service will continue and entitle them to hold their positions as mechanics over others with less seniority. *But this later right, if it exists, inures to them, after the statutory one-year period, from the contract and not from the statute.* In an action such as this the courts have no power to 'freeze' the contractual rights of the parties or of these appellants to their jobs as mechanics after the statutory one-year period." (Emphasis supplied.)

There is nothing in the Selective Training and Service Act that modifies or alters in any manner the provisions of the Railway Labor Act, 45 U. S. C. §151, *et seq.*, which latter Act requires respondent to contract collectively with the exclusive bargaining representatives selected by its employees; nor can such an implication be drawn from the terms of the Selective Training and Service Act. The rights of the veteran are not frozen by that Act, nor are the duties of the employer. Such rights are at all times a proper subject of full-faith collective bargaining. The veteran

accumulates time toward his seniority while he is in the armed forces. Upon his return from the armed forces he must be given the position which he is entitled to receive with that cumulated seniority. For a period of one year he must not be discharged or demoted from the position afforded him by that seniority. For that one year he may look to the Act for his security in that position. He may look to the Act to secure him in the seniority accumulated by him while he served in the armed forces, but the employment which he must be given is controlled by the employer's circumstances and the collective agreement, except that he must be restored to his old position without loss of seniority and kept there for one year. At the expiration of one year he must look to his contract of employment. If he has no contract of employment, his security as to employment ends with the statutory year. *Fishgold v. Sullivan Drydock & Repair Corp., et al., supra; Trailmobile Co., et al., v. Whirls, supra; Aeronautical Industrial Dist. Lodge 727 v. Campbell, et al., supra.*

The argument of petitioner to the effect that the veterans' rights are frozen by the Act has been answered fully by this Court in the three cases above cited. His argument seems to be a rehash of the argument made in the *Trailmobile Company* case, *supra*. The construction given the Act does not penalize the veteran at the end of one year because of his military service; it does not disadvantage his position because of his military service, nor does it automatically deduct the time he accumulated on his seniority while in the service of the nation. The fact that under the Act the

time he served in the armed forces must be added to the time actually employed in calculating his annuity under the Railroad Retirement Act of 1937, 45 U. S. C. §228a, *et seq.*, does not indicate in any manner that the veteran can look to the Selective Service Act for security in employment after the termination of the one-year statutory period.

### CONCLUSION.

Respondent has been placed at a decided disadvantage in presenting its case by reason of the fact that the Solicitor General has presented it along with the *Haynes* case, No. 29, and has treated the cases as only one case so far as the issues and the facts are concerned, except that he does acknowledge that there is in the *Haynes* case a question of back pay which is not at issue in the instant case. In the instant case, in the District Court, all of the facts as to petitioner's employment, the employment of those working with him and the contract of employment were developed. That is not true of the *Haynes* case.

Petitioner attempts to avoid those facts (the real facts which were before the District Court when the action was dismissed) by saying that both cases were dismissed before evidence had been taken (Br. 8) and that the factual allegations of the complaints must be taken as true. That is not true in this case. On the same day that respondent filed its answer, it filed its request for admissions under Rule 36, Federal Rules of Civil Procedure. Rule 36 is one of the Rules pro-

mulgated for the purpose of determining the issues and to discover the facts upon which the issues are based. That rule is universally used to determine whether or not there is really an issue of fact to be tried. Even petitioner recognizes that the admissions are properly to be considered. He quotes (Br. 6) from the provisions of the collective bargaining agreement set out in respondent's request for admission No. 23, page 6 of the record, and admitted by petitioner in his response, page 10 of the record.

If the instant case must be decided here by assuming that the factual allegations of the complaint are true, it will be decided upon a false statement of facts and conclusions set out in the complaint. Respondent's request for admissions (R. 4-7) contain all of the facts as to petitioner's employment by respondent, and the facts as to the employment of those with whom he worked, both before and after he served his country. It contains the provisions of the agreement under which petitioner worked. All of those facts were admitted either by petitioner's response (R. 10) or by the uncontroverted affidavit (R. 12) filed in support of respondent's motion for summary judgment pending in the District Court when the action was dismissed.

Those admitted facts entirely refute petitioner's statements in his brief that petitioner is seeking no advantage over non-veteran employees; that non-veteran employees are enjoying superior status; that petitioner's seniority has been reduced by reason of the time he served his country; that the complaint was

dismissed without an examination of rights conferred under the seniority system involved; that in determining the question here involved we must start with the proposition that petitioner was denied the position which his seniority alone entitled him to receive had he not been in military service; that petitioner was discriminated against as a result of his service to the nation; and the various assumed things that he says the dismissal of this action stands for or establishes. The facts presented by the record show, without contradiction, that petitioner was not restored to an inferior position; that his seniority was not reduced, but, on the contrary, he was credited with the entire time he was in the armed forces; that he was restored to his old position without loss of seniority; that he is not entitled to the preferred standing which he claims at Corbin; and that he had no seniority at Corbin before entering the armed forces and could not accumulate seniority at that point while in the armed forces.

Respondent contends that the dismissal of this action was simply a determination by the District Court, upon the whole record before it, that petitioner was restored to the position which he left, without loss of seniority (with cumulated seniority), that the respondent fully complied with the provisions of the Selective Training and Service Act; that the claim of petitioner for seniority at Corbin from a date prior to the day he first worked there is a claim of a "preferred standing" or "superseniority"; that any possible right that petitioner might have had to that "preferred standing" or "superseniority" terminated with the statutory year,

which had elapsed when the action was dismissed; and that there was no factual issue in the case upon which the District Court could have, under the law, granted petitioner the relief demanded by him.

Respondent asks that the judgment of the District Court dismissing the action be affirmed, for the reason that the question at issue was moot when the action was dismissed, and for the further reason that when the action was dismissed by the District Court the facts before the Court established that petitioner had been fully restored to his old position without loss of seniority, and that he had been given all of the rights to which he was entitled under the Selective Training and Service Act.

Respectfully submitted,

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No. 39

CHARLES ELMORE CROPLEY  
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IN THE

# Supreme Court of the United States

October Term, 1949

JOHN S. HAYNES,

*Petitioner,*

CINCINNATI, NEW ORLEANS and TEXAS PACIFIC  
RAILWAY COMPANY,

*Respondent.*

## BRIEF OF RESPONDENT

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IN THE  
**Supreme Court of the United States**

October Term, 1949

No. 29

JOHN S. HAYNES,

*Petitioner,*

v.

CINCINNATI, NEW ORLEANS and TEXAS PACIFIC  
RAILWAY COMPANY,

*Respondent.*

**Brief of Cincinnati, New Orleans and Texas  
Pacific Railway Company, Respondent.**

**OPINION BELOW**

The opinion of the United States District Court for the Eastern District of Kentucky is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit (R. 17) is reported at 171 F. 2d 128.

**JURISDICTION**

The petition for writ of certiorari was filed on February 2, 1949, and was granted on April 4, 1949 (R. 18). Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

<sup>1</sup> The name of respondent was changed by order of this Court dated May 2, 1949, from Southern Railway System to the name now appearing.

## COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, are of indefinite duration, when the claimed status and seniority are superior to and inconsistent with the status and seniority to which he is entitled under provisions of a collective bargaining agreement applicable to employees on furlough or leave of absence; or, whether the right to such alleged statutory status and seniority terminates upon the expiration of the first year of the veteran's reemployment, leaving his status and seniority then to be determined by the provisions of a collective bargaining agreement covering all employees, veterans and non-veterans.

2. Whether this cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

## STATEMENT OF CASE

The petitioner's statement of fact is substantially correct except that such statement overlooks the following:

1. that Haynes did not file his complaint until fifteen months after the date of his reemployment;
2. that the record discloses no protest made during those fifteen months after reemployment at the same job and classification Haynes left and with seniority as of July 6, 1940, the date of his original employment.

Furthermore, the petitioner before the United States Court of Appeals made no claim that he was entitled to back wages, and this aspect of the case, having not been urged before the Court of Appeals, cannot be presented as a justiciable controversy to this Court. *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458.

## SUMMARY OF ARGUMENT

Respondent maintains that the decisions of the lower courts in this case be upheld by this Court on the following grounds:

I. The statutory protection afforded by Section 8 (c) of the Selective Training and Service Act which gives the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration to employment, terminates one year after his restoration to service.

II. This cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

## ARGUMENT

**I. The Statutory Protection Afforded by Section 8 (c) of the Selective Training and Service Act Which Gives the Reemployed Veteran a Preferred Standing over Employees Not Veterans Having Identical Seniority Rights as of the Time of His Restoration to Employment, Terminates One Year After His Restoration to Service.**

The petitioner, plaintiff below, sought to enforce his right as an honorably discharged veteran through the provisions of Section 8 of the Selective Training and Service Act, and jurisdiction of the District Court was based solely upon Section 8 of said Act.

In the petition filed in the District Court (R. 1) there is no allegation that machinist helpers returning from furlough or leave of absence, were entitled by contract express or implied, to be given positions and seniority as helper apprentices which positions they could or would have received had they not been absent.

Upon his return from the service, the petitioner was restored to the position which he left at the time he was

inducted into the Armed Services. Moreover, petitioner was considered as having been on furlough or leave of absence, just as any other employee, as provided by Section 8 (c) and given seniority as of July 6, 1940, the date of his original employment. However, petitioner, through this action, claims (1) that the Selective Training and Service Act gave him certain rights over and above those to which he would have been entitled under the collective bargaining agreement as an employee returning from furlough or leave of absence; and (2) that under said Act, he had the statutory right to claim a position other and different from that which he left to enter the Armed Forces, with a seniority status in such other position dating from the time he would have attained such position had he remained in the employ of the railroad, instead of going on furlough or leave of absence to enter the Armed Forces. Petitioner claims a retroactive seniority date in a position of helper apprentice (the position other than that of machinist helper which he left to enter the Armed Forces) as of the date "he would have had" such position, ignoring entirely the question of whether or not he would have been entitled to such position under the collective bargaining agreement as an employee on furlough or leave of absence.

Consequently, it is apparent that the claim of petitioner is for a special statutory status to which non-veteran employees on furlough or leave of absence would not be entitled. It is the contention of this respondent that even if petitioner could prove that he would have been promoted to the position of helper apprentice so as to give him a special statutory right under the Selective Training and Service Act, which it is believed cannot be proved on the merits, it was a right of limited duration, and could not be enforced at a time subsequent to one year from the date of petitioner's reemployment.

The respondent's contention is supported by the decision of this Court in *Trailmobile Company v. Whirls*, 331 U. S. 40, wherein the question involved concerned the *duration* of the veteran's restored statutory seniority standing. This Court in that case stated the issue as follows:

... "whether under § 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues." (p. 51)

In the *Trailmobile* case the Government argued that under Section 8 (c) the veteran upon reemployment is entitled to retain indefinitely his prewar plus service-accumulated seniority and moreover, that such seniority cannot be taken away by the bargaining agreement or by the employer. This Court held that so much of the veteran's protection ends with the statutory year as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration.

In that case the veteran, Whirls, not only claimed that the statute entitled him to be restored to his former position without loss of seniority, and to be free from being discharged without cause one year thereafter, but also that it preserved his seniority status against any impairment for as long thereafter as his employment should continue. This Court rejected this last contention and held that after the expiration of the one year period the statute did not confer upon the veteran any different rights than those enjoyed by his non-veteran fellow employees.

The contention made by Haynes through the allegations in his petition discloses that Haynes is in even a more favorable reemployment status than Whirls, inasmuch as

Haynes has his seniority, his work, and his Union, while in the *Whirls* case, as set forth in the dissenting opinion, Whirls was left without any of the foregoing.

The respondent herein does not contend that after the statutory year of reemployment, Haynes would be unprotected in his employment status and seniority. Although the protection of the statute expired at the conclusion of one year, any contractual rights which the veteran enjoyed in connection with his employment would not automatically terminate; but the veteran would thereafter be left in the same category as any other employee and could only enforce his contractual rights through the same procedure as that available to non-veteran employees. Consequently, after the first year of his reemployment Haynes was in the same position as that of a non-veteran and retained his employment status and seniority under the collective bargaining agreement, but he did not retain the statutory preference over non-veterans enjoyed by him during the first year of reemployment.

Respondent respectfully submits that its position is upheld by the opinion of this Court in the *Trailmobile* case just discussed.

## **II. This Cause Is Rendered Moot by the Expiration of More Than One Year's Reemployment, Accepted Without Protest.**

While the District Court sustained the motion to dismiss on the ground that the action was moot, relying on the *Trailmobile* case, *supra*, as authority, respondent contends that the dismissal was also proper because of the laches of the petitioner.

Petitioner, while in respondent's permanent employment, enlisted in the Armed Forces on February 1, 1942, and served until October 31, 1945, the date of his honorable discharge. On November 16, 1945, he duly applied for

reemployment and was reemployed the same day as machinist helper with seniority as of July 6, 1940, the same position and seniority which he held the day he entered the Armed Forces. *Fifteen months thereafter*, on February 14, 1947, petitioner filed his complaint herein alleging that respondent had not complied with the Selective Training and Service Act of 1940. Moreover, the record in this case does not reveal any protest made to respondent by the petitioner during the fifteen months preceding the filing of his complaint against what he now contends to be a wrongful restoration of employment.

There are numerous cases which hold that laches on the part of the returned veteran destroy his right to reinstatement and other benefits under the Selective Training and Service Act.

In *Dacey v. Bethlehem Steel Co.*, 66 F. Supp. 161, application for reemployment under the Act was made on or about October 1, 1944 while suit was not begun until about nine months later. The Court held that where the veteran delays an unreasonable length of time in enforcing his demands, it is unfair to the employer to be compelled to pay compensation for the interim period. The *Dacey* case is followed by the District Court in the case of *Thompson v. Chesapeake & O. Ry. Co.*, 76 F. Supp. 304, 308.

In the latter case, the Court also referred to *Kay v. General Cable Corporation*, 59 F. Supp. 358, and the statement of Judge Meaney at page 360 as follows:

"The Act provides a definite course of procedure whereby the discharged veteran might immediately have recourse to the District Court upon the refusal of an employer to restore him to his former position. The Act contemplates that such action shall be taken immediately upon an employer's refusal to restore and specifically instruct that 'The court shall order a speedy hearing in any such case and shall advance it

on the calendar.' It follows that if proceedings are not instituted in the District Court until some six months following the veteran's discharge from service and the employer's refusal to restore him to his former position, notwithstanding that negotiations between the employer and the veteran have been held in the interim, it would be beyond the scope of the Act to compel the employer to compensate for such extended period."

That the employer should not be held responsible for the delay of the veteran in enforcing his demand, and should not be penalized because of such delay, is decided by the District Court in *Azzerone v. W. B. Coon Co.*, 73 F. Supp. 869.

In *Daniels v. Barfield*, 77 F. Supp. 283, the delay of a veteran for seven months after discharge to make formal demand for reinstatement and benefits under the Selective Training and Service Act was held so unreasonable as to amount to acquiescence in his employer's action and resulted in forfeiture of his rights under the Act.

The Court stated:

"The very essence of Sec. 308(e) is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it, but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendant and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefit."

In *Anglin v. C. & O. Ry. Co.*, 77 F. Supp. 359, it was held that an unreasonable delay in enforcing a demand under the Selective Training and Service Act resulted in the refusal to award any compensation for the interim

period. To the same effect is *Noble v. International Nickel Co.*, 77 F. Supp. 352.

In *Polansky v. Elastic Stop Nut Corporation*, 78 F. Supp. 74, it was held that a veteran's right to back pay was lost by laches. Therein, the veteran's right to recover a wage differential pursuant to the Selective Training and Service Act upon the claim that the employer had failed to re-instate him to a proper position, was held to have been lost by laches where there was no indication that the veteran raised any determined objection or attempted any real effort to reach a settlement with employer until the institution of suit under the Act some thirteen months after his reemployment. The Court therein stated: "Such lack of diligence is not entitled to reward."

It is respectfully submitted that the delay of fifteen months evidenced by the record in this case between the date of reemployment and the filing of the complaint amounts to laches and acquiescence in the entire situation such as to warrant a forfeiture of any rights Haynes may have had, had he acted within a reasonable time.

Finally, respondent urges that the petitioner before the United States Court of Appeals made no claim concerning the recovery of back pay. This aspect of the case, having not been urged before the Court of Appeals, cannot be presented as a justiciable controversy to this Court and any argument made before this Court in support thereof, should be ignored. *Edward Hines Yellow Pine Trustees v. Martin*, (supra).

### CONCLUSION

For the reasons stated, the statutory protection afforded by Sec. 8(c) of the Selective Training and Service Act was not available to the petitioner at the time he filed his complaint fifteen months after reemployment in the same job and classification he had left, and with seniority as of the

date of his original employment. The judgment below should be sustained.

Respectfully submitted,

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